No. 77-388

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

At this late date, it is hardly necessary to state the traditional and continuing responsibility of the federal government for the welfare of Indian Tribes. It may be appropriate, however, to note the reasons that especially call for our participation in this particular case.

First, of course, the Court itself invited our views at the jurisdictional stage. Having, in response, urged the Court to note jurisdiction and to give the case plenary consideration, it would seem appropriate that we contribute a brief on the merits. The case, moreover, involves the construction of a federal statute which is administered, in important part, by agencies of the United States. There are immediate practical considerations as well. The litigation directly implicates federal law enforcement responsibilities, for, if the judgment is affirmed, much of the jurisdiction relinquished by the State will return to the federal government—at least until new consensual arrangements are made.

But there is yet a further ground for our appearance—which also perhaps excuses the unusual length of the present submission. It is that, on earlier occasions, both the Department of the Interior and the Department of Justice have voiced views at odds with those expressed here. In those circumstances, we owe it to the Court, and to the parties, to explain in some detail the reasons that have impelled us to this change of position.

STATEMENT

In the district court, a substantial factual record was made to support, or disprove, the charge that, in practice, the State of Washington denied the equal protection of its laws to Indians within the Yakima Reservation. But that is not the issue in this Court. Certainly, it is not the question we address. The controversy is no longer confined by the particular factual situation prevailing on the Yakima Reservation. While the context remains relevant, the issues are now more broadly stated, primarily turning on the proper construction of Public Law 280 and the constitutional validity of the Washington statute on its face.

For this reason, and because we fully discuss the reach of both the State and federal legislation in the argument that follows, we outline the background of the litigation very briefly.

1. The Yakima Indian Reservation is located in the State of Washington. The Reservation consists of approximately 1,387,505 acres, of which about 80 percent is held in trust by the United States for the Tribe or individual members. The remaining parcels of land, some 270,895 acres, are held in fee and scattered in "checkerboard" fashion throughout the Reservation. More than 5,000 members of the Yakima Indian Nation permanently live on the Reservation, and that number increases during the summer months. There are some 22,000 other residents, almost half

of them living within the municipal boundaries of Wapato, Toppenish and Harrah.

Since 1855, when it was established, and until a decade and a half ago, except only for matters that did not affect Indians, disputes arising within the Reservation were resolved by federal and tribal authorities. In 1953, however, Congress enacted Public Law 280, 67 Stat. 588 (*infra*, pp. 7a-11a), permitting all States to assert jurisdiction within Indian reservations, provided prescribed procedures were followed. Invoking that authority, the Washington legislature, in 1957, undertook to assume both criminal and civil jurisdiction over any Tribe that requested it. Laws of Washington, 1957, ch. 240 (*infra*, pp. 12a-14a). The Yakima Indian Nation made no such request and was accordingly not affected.

But, in 1963, the Washington legislature enacted a new law providing for limited State jurisdiction without tribal consent. Laws of Washington, 1963, ch. 36, now RCW §§ 37.12.010-070 (1964) (*infra*, pp. 15a-18a). Henceforth, in the case of a nonconsenting Tribe, like the Yakimas, the State assumed full civil and criminal jurisdiction over unrestricted lands, but elsewhere within reservations asserted jurisdiction over Indians only with respect to eight categories of subject matter. We have sought to particularize the consequences of this legislation for criminal cases in an appendix (*infra*, last fold-out page).

In 1968, Congress amended Public Law 280 so as to preclude, for the future, unilateral State assertions of jurisdiction over Indian country without the consent of the Tribes (*infra*, pp. 19a-23a). Although States were encouraged to retrocede jurisdiction already acquired, they were not required to do so. Accordingly, Washington's action in 1963 is unaffected by the new legislation and must be judged under Public Law 280 as it then read.

2. The Yakima Indian Tribe filed this suit in the United States District Court for the Eastern District of Washington seeking a declaration that the partial assertion of state jurisdiction over its reservation was invalid and an injunction against the continued exercise of such jurisdiction. The Tribe contended (1) that Public Law 280 did not permit a partial assumption of jurisdiction either by geography or subject matter, and (2) that the State had failed to comply with the requirement of Public Law 280 that it amend its constitution before asserting any jurisdiction over Indian lands within the State. The Tribe also argued that the partial assumption of jurisdiction by geography and subject matter, even if authorized by Public Law 280, violated constitutional requirements of due process and equal protection. Finally, the Tribe contended that any State jurisdiction was at most concurrent with tribal jurisdiction.

The district court denied relief. On the issue of the State's compliance with Public Law 280, the court

held (A. 5, 6, 11, 26-27, 31)[1] that it was bound by the decision of the Ninth Circuit in *Quinault Tribe of Indians* v. *Gallagher*, 368 F.2d 648, certiorari denied, 387 U.S. 907, determining that the State, without amending its constitution, could assume partial geographic and subject matter jurisdiction over Indian reservations where the tribes had the option of requesting that full jurisdiction be assumed. Although noting evidence that subjection to state jurisdiction caused "disadvantages" for Yakima Tribe members (J.S. 63), the court also held that the "fundamental constitutional right of equal protection is not shown to have been violated" (*id.* at 64).

The court of appeals, sitting *en banc*, adhered to its decision in *Quinault Tribe of Indians* v. *Gallagher*, *supra*, that Public Law 280 allowed the assumption of partial subject matter and partial geographic jurisdiction. Finding that "the applicable legislative history of PL-280 provides reasonable support for *Quinault*" (J.S. 44), and stating that "reversal of *Quinault* * * * at this late stage, along with a new interpretation of PL-280, could lead to unfortunate law enforcement problems for thousands of native Americans" (*id.* at 40), the court declined to "overturn a reasonable interpretation of an ambiguous statute understood for a generation to be the law when the consequences of so doing are so uncertain

[1] The Jurisdictional Statement does not include the opinions and orders of the district court rejecting the contentions advanced under Public Law 280. However, they are now printed in the joint Appendix.

and far-reaching" (*id.* at 45). The court noted, however, that "Washington's checker-boarding of criminal jurisdiction might appear particularly inefficient and that its elimination may be desirable" (*ibid.*).

Five dissenting judges concluded that *Quinault* should be overruled. They noted Congress' recognition that "checkerboard" jurisdiction was "antithetical to effective law enforcement" (*id.* at 53) and pointed out that even the State had agreed that "[t]he Yakimas have no effective law enforcement on their reservation" (*id.* at 54). The dissenters also relied on the legislative history of the 1968 amendments to Public Law 280, which they said indicated that partial subject matter jurisdiction had not previously been authorized (*id.* at 58).

On remand from the *en banc* court, a panel of the court of appeals turned to the constitutional issues and held that Washington's partial assumption of jurisdiction on the basis of "land-title classification" (*i.e.*, full jurisdiction over fee but not over non-fee land) violated the equal protection clause of the Fourteenth Amendment (J.S. 33). The court noted that a Yakima Indian living on non-fee land was denied law enforcement protection from the State of Washington on that basis alone, while a Yakima Indian living on an adjoining parcel of fee land received protection (*ibid.*). This discrimination, the court held, lacked a rational basis because "[t]he state's interest in enforcing criminal law is no less 'fundamental' or 'overriding' on non-fee lands than on fee

lands," and "[n]o showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement" (*id.* at 35). The court further concluded that the unconstitutional provision was not severable from the remainder of the statute and, hence, that "the whole statute must be rewritten" (*id.* at 36).

ARGUMENT

INTRODUCTION AND SUMMARY

As we have noticed, the court of appeals on remand reached the constitutional question under compulsion of a holding by the full court rejecting the claim that the jurisdictional scheme imposed by the State of Washington in 1963 violated the terms of Public Law 280. This Court, of course, is not so handicapped and, in normal course, would address the constitutional issues only if that was inevitable. Indeed, since "the validity of an act of Congress is drawn in question" by the combined rulings of the court of appeals, we assume the Court will follow the "cardinal principle * * * [of] first ascertain[ing] whether a construction of the statute is fairly possible by which the question may be avoided." *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369, quoting from *Crowell* v. *Benson*, 285 U.S. 22, 62.

In our submission, it is unnecessary to reach the Equal Protection claim in this case. We so conclude because, in our view, Public Law 280 did not author-

ize Washington to assume the jurisdiction over the Yakimas it asserted by its 1963 enactment. On two independent grounds, we believe the State statute overstepped the boundaries announced by Congress in 1953.

1. We first address (*infra*, pp. 11-59) the question whether Washington was free to assume *any* new jurisdiction over Indian country without first removing, by the usual process of constitutional amendment, a disclaimer of jurisdiction embedded in the State constitution.

The State contends that this "disclaimer issue" is not before the Court, both because it is not comprised within the question set down for argument and because it is foreclosed by previous decisions of this Court. We examine those threshold objections, concluding that they are without substance. We also explain why this issue is one of federal law.

We then turn to the merits of the issue. Examining both the text and the legislative history of Public Law 280, we demonstrate that the Congress of 1953 believed certain States, including Washington, could not assume jurisdiction over Indian reservations until the "legal impediment" in their constitutions had been removed, and, further, that this would require submission of a constitutional amendment to the people of the State as a whole. And we conclude that, so believing, Congress wrote a discrete provision into Public Law 280 (Section 6) which not only permitted, but *required*, the disclaimer States to un-

dertake that procedure before asserting jurisdiction within Indian country.

Out of abundance of caution, we next consider the correctness of these congressional assumptions. This leads us to the Enabling Act of 1889 authorizing the admission of Washington and three other States into the Union on certain conditions, including the insertion into their organic acts of the Indian disclaimer provision. Both the text and the legislative history of the Act, we conclude, show that the affected States were intended to be disabled from importing their laws into Indian country. What is more, we show that the Congress of 1889 meant these disclaimers to be revocable only with the consent of the United States and of "the people" of the State, then understood as connoting the entire electorate.

Finally, we briefly address the concern expressed in some quarters that our submission, if sustained, would have very disruptive consequences. We point out how limited, in fact, the impact of such a holding would be, and, on the other hand, its tendency to diminish existing frictions, to end the present concededly inefficient and unsatisfactory confusion in law enforcement, and to promote more suitable consensual arrangements.

2. Our alternative submission (*infra*, pp. 59-88) is that Public Law 280 did not authorize the partial "checkerboard" assumption of jurisdiction attempted by Washington in 1963. Close examination of the text of the federal statute leads us to conclude that the so-called "option States" were given no different

choices, if they assumed jurisdiction, than the five States immediately extending their laws to Indian country. We note that nothing in the legislative history of the 1953 Act remotely suggests otherwise.

Nor do the materials underlying the amendment of Public Law 280 in 1968 suggest a different conclusion, in our view. At that date, partial assumption of jurisdiction, albeit with tribal consent, was expressly permitted for the future. We note that conflicting views were expressed as to whether this was a change in the law. But we conclude that the most authoritative congressional voices, taking the affirmative view, should outweigh the now repudiated opinion expressed by the Department of the Interior.

We then treat briefly the suggestion that Congress in 1968 ratified Washington's jurisdictional scheme, even if it was not authorized by Public Law 280 as originally enacted. That argument, we submit, finds no support in the text of the 1968 amendments or any other evidence of congressional intent.

Finally, we consider the practical consequences of a holding that partial assumption of jurisdiction over Indian country was not authorized before 1968. As before, we conclude that the "unsettling" effect would be minimal and that the benefits would be substantial.

I. THE DISCLAIMER ISSUE

We follow the court of appeals (J.S. 38, 39) in labelling as the "disclaimer issue" the question whether Public Law 280 authorized the State of

Washington to assert any new[2] jurisdiction within Indian reservations[3] without first amending, by the usual process, the provision of the State constitution that disclaims any competence over Indian country. The issue arises because of the somewhat complex structure of the 1953 Act of Congress, implementing another shift in our attitude to Indian autonomy.

The general scheme of Public Law 280 is well known. In five named States[4]—the so-called "automatic" or "mandatory" coverage States—Congress made a present cession to the State of full criminal and civil jurisdiction[5] over "Indian country," save for three exempted reservations. Sections 2 and 4, *infra*, pp. 7a-10a. The remaining States—the "option"

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[2] We say "new" in light of this Court's ruling in *United States* v. *McBratney*, 104 U.S. 621, and its progeny, that, notwithstanding disclaimers in Acts of admission, the several States always had jurisdiction to try non-Indian offenders committing crimes within Indian reservations when the victim was also non-Indian. That exception was reaffirmed in *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. See, also, *United States* v. *Antelope*, 430 U.S. 641, 643 n. 2, 644 n. 4, 648 n. 9.

[3] Strictly speaking, the question affects all "Indian country," including Indian communities outside a reservation. See 18 U.S.C. 1151. But we are here concerned only with reservation lands, all of which are part of "Indian country" regardless of the race of the owner and their restricted or unrestricted status.

[4] These are: California, Minnesota, Nebraska, Oregon and Wisconsin. A sixth State, Alaska, was later added. Act of August 8, 1958, 72 Stat. 545.

[5] There are limited exceptions which are not relevant here. See Sections 2 and 4, *infra*, pp. 8a, 10a, now 18 U.S.C. 1162(b) and 28 U.S.C. 1360(b). And see *Bryan* v. *Itasca County*, 426 U.S. 373.

States—were authorized to assume jurisdiction over "Indian country" within their borders if they chose. Sections 6 and 7, *infra*, pp. 10a-11a. But all "option" States are not dealt with in the same way. Of special interest to us is the sub-class of states with constitutional or statutory provisions disclaiming jurisdiction over "Indian country". These "disclaimer" States cannot assume jurisdiction of "Indian country" until "the people thereof have appropriately amended their State constitution or statutes as the case may be." Section 6, *infra*, pp. 10a-11a.

The State of Washington would appear to be one of the so-called "disclaimer" States, the State Constitution having always contained a provision disavowing "all right and title" to "all lands * * * owned or held by any Indian or Indian tribes" and asserting that such lands "shall remain under the absolute jurisdiction and control of the congress of the United States." Revised Constitution of Washington (1966), Art. XXVI, par. Second, *infra*, p. 4a. Since this constitutional disclaimer has never been removed by amendment, the question arises whether the Washington legislature could validly assert any jurisdiction within the Indian reservations in the State, as it purported to do in 1963.

Considerations of judicial economy, among others, counsel addressing this disclaimer issue first. Indeed, if Public Law 280 be construed as requiring the State of Washington to amend its constitution before assuming *any* new jurisdiction within Indian reservations, the Court would be spared the more complex task of interpreting Washington's 1963 law, and of

assessing its validity as a *partial* assumption under Public Law 280 or under the Equal Protection Clause. In light of the State's contention to the contrary (Wash. Br. 27-32), however, it becomes necessary to show that the question is before the Court.

A. The Question Is Not Foreclosed

1. The State first argues (Wash. Br. 28-29) that the Court's formulation of the issue in its Order noting probable jurisdiction forecloses the question. In our view, that is demonstrably untrue.

The Court's formulation of the issue to be addressed, rejecting the State's narrow wording (J.S. 8),[6] appears to be borrowed (with only a minor transposition) from our own statement of the "Question Presented" in the Memorandum we filed in response to the Court's invitation. See Memorandum for the United States as Amicus Curiae, p. 1. And we had there expressly suggested that the Court consider the disclaimer issue. *Id.* at 9, 13-14.[7] It is

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[6] Washington's formulation of the question presented at the jurisdictional stage encompassed only the equal protection issue (J.S. 8):

> Whether any rational basis exists for the State of Washington to have assumed jurisdiction within Indian reservations in a manner which recognizes both the fundamental interests of the state *and* the unique historical and cultural status of trust lands?

[7] We also referred (*id.* at 13) to our brief in *Oliphant* v. *Suquamish Indian Tribe*, No. 76-5729, where we had discussed this issue as involved in the present case. Brief for the United States as Amicus Curiae, pp. 54-58.

accordingly reasonable to suppose that the Court, like ourselves, viewed the statement of the question as encompassing this issue. Certainly, the Court's formulation, referring to "the statutory requirements of Public Law 280," is capable of comprising our question.

It would, moreover, be most extraordinary if the Court had intended to foreclose the disclaimer issue. It is common ground that the State's failure to amend its constitution was asserted against Washington's 1963 law in both courts below (Wash. Br. 28; Motion to Affirm, p. 5). The district court rejected the contention (A. 4-5, 11, 26, 31). Because the case was ultimately disposed of on federal constitutional grounds, the issue was not reached by the court of appeals.[8] Yet, of course, the appellees are free to defend the judgment in their favor on any federal ground urged below. See 28 U.S.C. 1254(2);[9] *Dandridge* v.

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[8] The court of appeals *en banc* did not have the question before it because of the limited purpose for which the full court convened. In passing, the majority opinion comments (erroneously, in our view) that the issue was foreclosed by this Court's Order in *Makah Indian Tribe* v. *Washington*, 397 U.S. 316 (J.S. 39). See our discussion of *Makah* below. The court of appeals, in a previous case, had rejected the argument. *Quinault Tribe of Indians* v. *Gallagher*, 368 F.2d 648, 657, certiorari denied, 387 U.S. 907.

[9] We read the cited provision as limiting the *appellant*, in attacking the judgment, to raising the question of the constitutionality of the State statute invalidated, but permitting the *appellee* to defend the judgment on any *federal* ground. That must be the case, otherwise the appellee—who has no reason to challenge by appeal or petition for certiorari a judgment which grants him all the relief sought—would be de-

Williams, 397 U.S. 471, 475 and n. 6. It follows that the disclaimer issue was unavoidably in the case when it reached this Court. And that issue remains here, unless the Order noting probable jurisdiction be taken as embodying a tacit summary ruling that the constitutional amendment challenge presents no substantial federal question. We prefer to believe that the Court does not adjudge the merits of a serious issue in such enigmatic ways. Compare *Gent* v. *Arkansas*, 384 U.S. 937-938.

2. Alternatively, the State contends that this Court, by summary orders in earlier cases, has foreclosed the disclaimer issue (Wash. Br. 29-32). The short answer is that this Court is always free to reconsider its decisions, especially so when the previous ruling was entered without plenary consideration. See, *e.g.*, *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1, 14; *Edelman* v. *Jordan*, 415 U.S. 651, 670-671; see, also, *Mandel* v. *Bradley*, 432 U.S. 173, 175-177. But, as it happens, we do not believe the Court has ever rejected the state constitutional amendment argument on the merits.

Notwithstanding the State's representation (Wash. Br. 30),[10] the question was not "squarely presented"

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prived of the benefit of the judgment rightly entered in his favor by the losing party's election to proceed by appeal rather than certiorari. The Court's Order in this case supports this view, since the statement of the question to be addressed concededly includes a non-appealable issue, *viz.* whether the partial assumption of jurisdiction is authorized by Public Law 280.

[10] As already noted (note 8, *supra*), the majority opinion of the court of appeals makes the same assumption.

to *this* Court in *Makah Indian Tribe* v. *Washington*, appeal dismissed, 397 U.S. 316. Although the Motion to Dismiss or Affirm (No. 922, O.T. 1969) noted the point (p. 7), the Jurisdictional Statement did not present the issue. Indeed, this Court treated the question as still open in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 177-178, and remanded a subsequent case for the State court to consider it. *Tonasket* v. *Washington*, 411 U.S. 451.

There remains only this Court's Orders dismissing for want of a substantial question the second appeal in *Tonasket* and the appeal in *Comenout* v. *Burdman*, 420 U.S. 915. We deal first with *Tonasket*. After the remand (411 U.S. 451), the Washington Supreme Court had reconsidered the disclaimer point and, by a divided vote, had rejected it. *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P.2d 744. The Jurisdictional Statement thereafter filed in this Court (No. 74-807) did raise the question. But it may well be that the Court deemed it "insubstantial" in the context of that case because intervening legislation (mentioned in the previous remand order, 411 U.S. 451) had rendered the practical importance of the issue *de minimis*.[11]

Like considerations may have governed this Court's disposition in *Comenout* v. *Burdman*, by an identical order entered on the same day. 420 U.S. 915. Because the order affecting the custody of the child

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[11] In our brief before the remand, we had suggested as much. See Brief for the United States as Amicus Curiae in No. 71-1031, O.T. 1972, pp. 17-19.

was only temporary and would soon expire, the case may have been viewed as likely to become moot.

3. In sum, it does not clearly appear that this Court has decided the disclaimer issue. To be sure, the Court of Appeals for the Ninth Circuit and the Washington Supreme Court have both rejected the argument. But, with the exception of *Tonasket* and *Comenout*, each of those rulings was made without the benefit of this Court's intervening decisions in *Kennerly* v. *District Court of Montana*, 400 U.S. 423, and *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, and without an opportunity to consider relevant unpublished hearings on Public Law 280. We submit the issue is worthy of this Court's plenary consideration.

B. The Question Is One of Federal Law

Of course, although the question is open and properly preserved, this Court can reach it only if it is one of federal law. See 28 U.S.C. 1254(2) and note 9, *supra*, p. 15. In our view, that is the case.

1. We begin with a principle of *federal* law: that, the *McBratney* situation aside (see note 2, *supra*), State jurisdiction over Indian country can be validly asserted only by leave of the United States. *Fisher* v. *District Court*, 424 U.S. 382, 386-388. This leads us immediately to the Act of Congress that is invoked as granting such permission, Public Law 280. It is Section 6 of that *federal* statute that must be construed. The question is whether that provision, which, in terms, assumes that in some cases it will be "necessary" to "amend * * * [the] State

constitution," and expressly precludes the effective assumption of State jurisdiction "until the people thereof have appropriately amended their State constitution or statutes as the case may be," means to leave it to the individual State to override a State constitutional provision by ordinary legislation. Whatever the answer, the issue is plainly one of federal law.

2. There is, moreover, another federal law aspect to the issue. The disclaimer in the Constitution of Washington is not there by local choice. As we shall see, it was a condition of the State's admission to the Union, and the terms of the disclaimer are dictated by the Enabling Act passed by Congress. In effect, the operative words of the Washington Constitution were framed by the national legislature for a federal purpose and in construing them we must look to the intent of Congress. Cf. *Delaware River Comm'n* v. *Colburn*, 310 U.S. 419, 427-428; *Petty* v. *Tennessee-Missouri Comm'n*, 359 U.S. 275, 278.

What is more, in the case of Washington, Congress not only required disavowal of jurisdiction over Indian country, but insisted, as a condition of admission, that the disclaimer be made part of the State *constitution*. Presumably, that was to better assure its permanent survival. In those circumstances, it may be doubted whether it is entirely a State law question by what means the constitutional disclaimer may be overridden. See *Dyer* v. *Sims*, 341 U.S. 22, 28-32; *Petty* v. *Tennessee-Missouri Comm'n*, *supra*, 359 U.S. at 278-280.

3. Finally, there lurks in the background a federal constitutional question. The consequence of Washington's 1963 law, if valid, is to withdraw from the reservation Indians within the State the protection of federal law in most situations and the right to be governed by their own laws in others. These are matters of fundamental importance to the Tribes. Even if they may be subjected to laws they have not chosen, the Indians may yet be entitled to insist that the State's assumption of jurisdiction over them be in accordance with usual "due process." It is, therefore, a question of federal constitutional relevance whether the State of Washington has sought to single out the Indians' case for special treatment by purporting to fashion a unique rule for abrogating a State constitutional provision. Cf. *Hunter* v. *Erickson*, 393 U.S. 385, 389-393; *Reitman* v. *Mulkey*, 387 U.S. 369, 376-377. See, also, *Gomillion* v. *Lightfoot*, 364 U.S. 339.

C. The Merits of the Question

Whatever else is debatable, there can be no disagreement that Public Law 280 deals with the so-called "disclaimer" States separately. That is the whole point of Section 6 (*infra*, pp. 10a-11a). Assuming, as we do, that Washington is such a State, we accordingly focus on that provision.

But the text of Section 6 does not immediately resolve the disclaimer issue. It is convenient to proceed by asking ourselves, in sequence, the following questions: (1) What was the congressional understanding in 1953 of the disclaimer State situation?;

(2) To what extent were these assumptions the basis of congressional action; and, finally (and perhaps in part unnecessarily) (3) Were the premises underlying Section 6 in fact correct?

1. *The Congressional understanding in 1953*

The mind of Congress is not always clearly revealed. But, in this instance, we are fortunate in having the transcript, albeit unpublished, of the critical committee hearings, which has once again [12] been submitted to the Court.[13] From that transcript, and other materials, we now know with reasonable certainty how Section 6 came to find its place in Public Law 280.

a. The genesis of Section 6 begins in the hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs. On June 29, 1953, that subcommittee was considering one of several bills that eventually led to Public Law

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[12] The unpublished transcript of hearings on Public Law 280 now submitted by the appellee has twice before been before the Court, in *Tonasket* v. *Washington*, 411 U.S. 451, and *Bryan* v. *Itasca County*, 426 U.S. 373. See 426 U.S. at 383 n. 9.

[13] The transcript covers two hearings: (1) Hearing on H.R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (June 29, 1953), and (2) Hearing on H.R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (July 15, 1953). They are both printed as Appendix I to the Appellee's Brief. We refer to both hearings hereinafter as "1953 Hearings," citing to the pages of the Appellee's Appendix I (the numbers at the bottom of the page).

280. The bill in question reached only the State of California—not a "disclaimer" State (1953 Hearings at 2). The Chief Counsel of the Bureau of Indian Affairs presented a substitute to the original bill, noting that both the State and the Tribes in California had indicated a wish to have state jurisdiction asserted (*id.* at 3). Although suggesting that the substitute recommended might serve as a prototype for other States, he cautioned that the Department of the Interior would urge exclusion of certain reservations where the Tribes preferred to retain their own laws (*id.* at 4, 10). He later explained that, at least tentatively, the Department would recommend exemption of the Colville and Fort Yakima Reservations in Washington (*id.* at 13).

It became clear, however, that the Members wished to consider a general bill, covering all or most States, and the Interior representative was asked to draft such a measure (*id.* at 5-19). It was then pointed out by Counsel to the Committee that "several * * * states have constitutional prohibitions against jurisdiction" (*id.* at 17). This provoked the following colloquy between the Chief of the Branch of Law and Order of the Bureau of Indian Affairs (William R. Benge) and Congressman Aspinall (*id.* at 17):

> Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would have to amend the constitution.*
>
> I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> Mr. Benge: *Yes, sir.* [Emphasis added.][14]

The Department of the Interior's substitute bill was then reported to the full Committee, on the understanding that it would encompass all Indian country which the Department would recommend for inclusion (*id.* at 18-20). The Department of the Interior duly responded. There were probably other communications, but the substance of the Department's position appears in a letter dated July 7 from Assistant Secretary Lewis, annexed to the House Committee report. H.R. Rep. No. 848, 83d Cong., 1st Sess. 7-8 (1953). That letter recites that the Bureau of Indian Affairs had consulted with State and local authorities and Indian groups in the five "mandatory" States and also Nevada and Washington. *Id.* at 7. He noted that certain Tribes in the "mandatory" States objected to State jurisdiction, and they were in fact exempted. But it was also stated that

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[14] Unless otherwise noted, the emphasis in all subsequent quotations has been added.

the Colville and Yakima Tribes in Washington likewise opposed the transfer to State jurisdiction and that they, too, had "a tribal law-and-order organization that functions in a reasonably satisfactory manner." *Id.* at 7-8.

The Assistant Secretary then listed the eight "disclaimer" States, including Washington, noting that "[i]n each instance the State constitution contains an appropriate disclaimer."[15] And he concluded that "[i]t would appear in each case, therefore, that the Congress would be required to give its consent and the *people* of each State would be required to * * * amend the State constitution before the State legally could assume jurisdiction." *Id.* at 8.

This information was evidently before the full House Committee on Interior and Insular Affairs

[15] Here, and throughout the debates on Public Law 280, the disclaimer States were said to be Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and Washington. These are, in fact, the only States with a disclaimer of jurisdiction over Indian lands in their State constitution which directly results from a provision in the Enabling Act for the admission of the State. We should note, however, that two other States, Idaho (Art. 21, § 19) and Wyoming (Art. 21, § 26), have identical provisions in their State constitutions and that those constitutions were submitted to Congress before the State was admitted (26 Stat. 215, 222). See *Village of Kake* v. *Egan*, 369 U.S. 60, 68. A strong argument can be made that Idaho and Wyoming are likewise covered by Section 6 of Public Law 280. On the other hand, their situation is different in that their disclaimer provisions were not directly framed by Congress. Without expressing any concluded view on the matter, we here follow the congressional pattern and exclude Idaho and Wyoming from the category of disclaimer States.

when it met on July 15. The Counsel to the Committee reported that, according to the Bureau of Indian Affairs, there were eight States, including Washington, which had "organic law impediments in their constitutions or other laws" preventing assertion of jurisdiction over Indian country (1953 Hearings at 23) and he submitted an amendment that would reach those "disclaimer" States. As he explained to the Members, "[the] proposed amendment * * * would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments *by the people* in the state, they could then take over the exclusive civil and criminal jurisdiction over Indians and Indian matters" (*ibid.*). Then as now, this was Section 6 (see *id.* at 25). A further new provision, Section 7 (see *id.* at 29), was proposed to permit "any other Indian states, some 15 or 18," where there was no such "legal impediment," "at such time as the *legislative body* affirmatively indicated their desire to so assume jurisdiction" (*id.* at 24).

When the new Section 6 was read, the Acting Chairman of the Committee, obviously noting that the proposal referred to both "state constitutions" and "existing *statutes*," commented (*id.* at 25): "I do not think we have to grant permission to a state to amend its own statutes." Counsel responded (*id.* at 26): "I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the [Enabling] Act and it may be unnecessary, but by

some state courts it may be interpreted as being necessary." Congressman Westland of Washington then expressly referred to the situation in his State (*id.* at 26):

> I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment in order that they can get at it.

A few moments later, another Member, pointing out that the state constitutional impediments were dictated by the congressional Enabling Acts (*id.* at 27-28), suggested that express reference should be made in Section 6 to the repeal of the Enabling Act obstacle. This provoked the comment that "Congress does not have to give consent to a state to amend its constitution or its laws" (*id.* at 27). But the rejoinder was made that the "disclaimer" States "have no right to change [their] constitution or even [their] statutes without consent of the Government" because those provisions were "in the constitution as a direct result of being in the Enabling Act" (*id.* at 28). Finally, the Acting Chairman questioned whether it was necessary to include the proviso in Section 6—which forbids the assertion of jurisdiction by a "disclaimer" State "until the people thereof have appropriately amended their state constitutions or statutes, as the case may be" (*id.* at 29). A Member responded affirmatively, and Section 6 was adopted (*id.* at 29).

The next day, July 16, the Committee filed its report. H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953). Except for an additional provision (Section 8) dealing with the application of the Indian liquor laws, later deleted (99 Cong. Rec. 10784 (1953)), the text of the bill as reported is identical with Public Law 280 as enacted. H.R. Rep. No. 848, *supra*, at 1-3. The report explains that the bill deals separately with (1) the five "automatic" or "mandatory" coverage States; (2) the eight "disclaimer" States, and, finally, (3) "all other States." *Id.* at 6-7. The explanation of the operation of the bill as it affects "disclaimer" States is as follows (*id.* at 6-7):

> [G]ive consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as

reported, proceed to amendment of their respective organic laws *by proper amending procedure.* [Emphasis added.]

The House passed the bill without debate on July 27 (99 Cong. Rec. 9962-9963 (1953)). In the Senate it was referred to the Committee on Interior and Insular Affairs (99 Cong. Rec. 10065 (1953)). That Committee apparently held no hearings, and, two days later, reported out the bill without amendment, adopting the House report *in haec verba.* S. Rep. No. 699, 83d Cong., 1st Sess. (1953); 99 Cong. Rec. 10217 (1953). The bill received very brief consideration on the Senate floor before it was passed on August 1. 99 Cong. Rec. 10782-10784 (1953). But it is worth noting that Senator Case, in presenting it, and Senator Barrett in supporting him, both adverted to the necessity for some States to "amend their constitutions" or to "remove their constitutional limitations" before asserting jurisdiction over Indian country. 99 Cong. Rec. 10782 (1953). Senator Case expressly mentioned Washington as one of these disclaimer States. *Ibid.* The President signed the bill into law on August 15 (99 Cong. Rec. 11161 (1953)), expressing "grave doubts" about the failure to require tribal consent and recommending an amendment to cure that defect. See *Public Papers of the President*, 1953, para. 166, p. 564, reprinted at 102 Cong. Rec. 399 (1956).

b. At a minimum, what emerges from the legislative history is that the 89th Congress believed the State of Washington, like seven other States, would

not be free to assume the new criminal and civil jurisdiction over Indian country tendered by Public Law 280 until it had amended its constitution by the normal popular referendum procedure. This conclusion was based on two subsidiary premises: (1) that the Enabling Act for the admission of Washington and the corresponding provision in the State constitution barred Washington from asserting the jurisdiction in question, and (2) that, because, in the case of Washington at least, the State "legal impediment" was embedded in the constitution, it could not be removed by ordinary legislation.

In *Tonasket* v. *State, supra,* a majority of the Washington Supreme Court concluded that both congressional assumptions were false. We believe the State court was in error. One does not lightly challenge the congressional understanding, especially when it involves construction of earlier federal legislation and is supported by those in the Executive Branch who are presumptively knowledgeable on the subject, as well, apparently, as State authorities.[18] See *Mattz* v. *Arnett*, 412 U.S. 481, 505 and n. 25. But, if it can be shown that the 83d Congress was in error, the question arises whether the legislative misunderstanding is nevertheless binding on the State.

In our view, the answer depends upon how, if at all, erroneous assumptions (conceding the point, *arguendo*) affected congressional action. We submit

[18] See the statement of Congressman Westland of Washington quoted *supra,* p. 26.

the premises underlying Section 6 of Public Law 280 *did* affect the result. Let us see.

2. *Congressional assumptions and legislative action*

a. The bald fact is that if the 83d Congress had shared the views of the Washington Supreme Court, Section 6 would never have been written. Section 7 (*infra*, p. 11a), requiring only "affirmative legislative action," would have served for all optional States. That is so because, as we shall see (*infra*, p. 40), Washington is in no different posture than the other disclaimer States. If Washington's Enabling Act and State constitutional disclaimer is no impediment to the assertion of jurisdiction, or if the obstacle can be overridden by ordinary prospective legislation, then the same is true for the seven other disclaimer States, and Section 6 has no life whatever.

What is more, it is probable that, but for the supposed state constitutional obstacle, Washington would have been included among the "mandatory States," excluding however the Colville and Yakima Reservations. We base that assumption on the fact that, as we have seen, in Washington—unlike the situation of the other option States except Nevada [17]—both the State authorities and the Tribes had been consulted (H.R. Rep. No. 848, *supra*, at 7-8; 1953 Hearings at 26), the State indicating its "readiness to take over

[17] The reason for not including Nevada as a "mandatory" State was quite different: it was reluctant to assume the additional financial burden involved in the absence of a federal subsidy. See pp. 71-72, *infra*.

on this jurisdiction" (*id.* at 26), the Colville and Yakima Tribes objecting and being, at least tentatively, recommended for exemption by the Department of the Interior (H.R. Rep. No. 848, *supra*, at 7-8; 1953 Hearings at 13). In those circumstances, it is fair to presume that, absent the special impediment of a constitutional bar, Congress would have resolved the matter for Washington as it did for Minnesota, Oregon and Wisconsin. See Public Law 280, Sections 2 and 4, *infra*, pp. 7a-9a.

Thus, at least the Colville and Yakima Tribes most likely would have been granted congressional *protection* from any unilateral State attempt to assert jurisdiction over them if the Washington Enabling Act and State Constitution had been deemed no obstacle.[18]

[18] We read Section 7 of Public Law 280 (before its amendment in 1968) as applicable only to States "other" than the "mandatory" States. Accordingly, the Reservations exempted by Sections 2 and 4 could be subjected to State jurisdiction only by subsequent *congressional* action. In fact, Congress has removed the exemption of only one Tribe, the Menominees of Wisconsin (68 Stat. 795), and that was done at the Indians' request. See *Menominee Tribe* v. *United States*, 391 U.S. 404, 410 n. 11. Subsequently, however, Congress repealed the "termination" Act affecting the Tribe (Menominee Restoration Act, 87 Stat. 770, 25 U.S.C. (Supp. V) 903-903f), and the State of Wisconsin has retroceded the jurisdiction previously assumed over the Menominee Reservation. See American Indian Policy Review Commission, *Final Report*, vol. 1, p. 202 (1977). The Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon remain exempt from State jurisdiction. 18 U.S.C. 1162(a); 28 U.S.C. 1360(a).

This is not to suggest that, as a matter of constitutional power, Congress could not have overridden the "impediment" of Article XXVI of the Washington Constitution. Indeed, it did just that in the case of Alaska. See Act of August 8, 1958, 72 Stat. 545. But, whatever the reason, the framers of Public Law 280 chose not to fully exert congressional authority. What considerations led to this decision, it is not easy to say. It may be that the 83d Congress, despite its "assimilative" viewpoint, thought it important to assure the full-fledged consent of the State's citizenry before this important step was taken, carrying with it substantial new responsibilities, among them a heavy additional financial burden. Popular approval may have been deemed especially appropriate in the "disclaimer" States on the assumption that the disclaimer provisions evidenced an unusual degree of white-Indian hostility.[19] It is not inconceiv-

[19] If cases reaching this Court this century in which the State or its non-Indian citizens were held to have wrongly attempted to assert jurisdiction over Indians or trespassed on Tribal rights are any guide, such an assumption might seem justified at least for the disclaimer States of Arizona, South Dakota, Montana and Washington. For the State of Washington, see, *e.g.*, *United States* v. *Winans*, 198 U.S. 371; *Seufert Bros.* v. *United States*, 249 U.S. 194; *Tulee* v. *Washington*, 315 U.S. 681; *Seymour* v. *Superintendent*, 368 U.S. 351; *Puyallup Tribe* v. *Washington Game Dept.*, 391 U.S. 392; *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44; *Antoine* v. *Washington*, 420 U.S. 194. See, also, *United States* v. *Pelican*, 232 U.S. 442; *Satiacum* v. *Washington*, 414 U.S. 1. And the friction continues. As recently as April of this year, continued interference with tribal fishing rights in Washington provoked the Court of Appeals for the Ninth

able that some who voted for Public Law 280 saw in the requirements of Section 6 a measure of protection for the Tribes against over-zealous legislatures.[20] Others no doubt simply deemed it "fitting and proper" that what had been settled by the people of the State as a whole should be undone only by them.

b. We cannot know with assurance what informed the legislative mind. On the other hand, we ought not blithely assume that Congress was indifferent to the method by which the disclaimer States would assume jurisdiction over unwilling Tribes.[21] But, motives

Circuit to comment that the State had engaged in "extraordinary machinations in resisting [the federal court's] decree" in *United States* v. *Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676, certiorari denied, 423 U.S. 1086, and that "[e]xcept for some desegregation cases * * *, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed this century." *Puget Sound Gillnetters Association, et al.* v. *United States District Court for the Western District of Washington, et al.*, Nos. 77-3129, 77-3208, 77-3209, 77-3654, 77-3655, C.A. 9, decided April 24, 1978, slip op. 2-3.

[20] In the only three instances of which we have knowledge, proposals for asserting State jurisdiction over Indian country sponsored by the legislature were, it is said, overwhelmingly defeated by the electorate when the matter was submitted to them. This is reported to have occurred in South Dakota in 1963 and 1966, and in Wyoming in 1964. See Petition for Certiorari in *Quinault Tribe* v. *Gallagher*, No. 1040, O.T. 1966, p. 11 n. 23. We are not informed that popular opinion has ever been tested in Washington.

[21] In the case of the Indians of the Yakima Nation, it is clear enough that they have at all times resisted State jurisdiction. As we have seen, their objection was reported to the

aside, it is clear that the framers of Public Law 280 translated their understanding (correct or not) into the text of Section 6.

That provision, it will be remembered, first grants consent to "the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction" over Indian country. And Section 6 then goes on explicitly to withhold any such jurisdiction "until the people" of the State "have appropriately amended their State constitution or statutes as the case may be." On its face, the text is in some respects ambiguous. But, in light of what we now know, the meaning is tolerably clear.

Section 6 twice refers to "the people," not by accident, but by design. We need only recall Congressman Aspinall's correction of the Interior Department representative's slip at the first subcommittee hearing. The latter had alluded to the "State legislature" amending the State constitutional disclaimer and Mr. Aspinall pointed out that "[t]he State legislature could not do it. The people of the State themselves would have to do it" (*supra*, p. 23). Obviously, that colloquy was borne in mind when the Department returned with a new draft bill. Indeed, the Assistant Secretary's letter, eight days later, recites that "the people of each State would be required to amend the

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Congress in 1953. Moreover, unlike other Tribes, they did not petition for coverage under Washington's elective 1957 law.

State constitution" (*supra*, p. 24), and, at the full Committee meeting a week afterwards, Committee Counsel was careful to explain that disclaimer States could assume jurisdiction "[a]t such time as they remove these impediments by the people in the State" (*supra*, p. 25). And, finally, the House Committee Report, issued the next day, carries the point forward by referring to the disclaimer States as now free to amend their constitution "by proper amending procedure" (*supra*, p. 28).

We are thus left in no doubt that, in Section 6, "the people" means what it says. To be sure, some confusion is created by using the same words in Section 7, where, presumably, the legislature alone is authorized to "obligate and bind the State."[22] This may be a mere slip of the pen, unthinkingly reproducing the formula of Section 6. Or, as "in such manner" suggests, the draughtsman of Section 7 may have been advertently using an all-inclusive expression to cover the case of a State that deemed it right to consult the whole of "the people" before irrevocably binding the State to assuming a burdensome new responsibility. But, however that may be, the legislative history of Section 6 is unambiguous: *there*, "the people" connotes the whole electorate.

Returning to the text of Section 6, we note the reference to "existing statutes." Here, again, we must turn to the legislative history for an explanation.

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[22] Committee Counsel was seemingly clear that the State's "legislative body" could speak for the State under Section 7. See *supra*, p. 25.

Although most speakers referred only to constitutional disclaimers, it was suggested that, in some States, there were like provisions also, or only, in statutory form. See *supra*, pp. 25-26. So far as we are aware, no State in fact had a merely statutory disclaimer.[23] But the draughtsmen of Section 6 apparently assumed otherwise. Whether, in that purely hypothetical case, Section 6 would require a popular referendum to repeal the statutory impediment, we need not decide.[24] It is, however, perfectly clear that the Section contemplates the removal of *constitutional* obstacles by the people themselves.

In our view, the interposition of the words "where necessary" does not affect the question. In light of the legislative history, that phrase—like "as the case may be"—merely covers the assumed (but factually nonexistent) case of a State with only a statutory disclaimer. Those concerned in the framing of Section 6 too often repeated that where there was a

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[23] There were, however, at least some States with statutes paralleling a constitutional disclaimer. See, *e.g.*, North Dakota Century Code § 57-02-08(4) (1972 Repl.); Oklahoma Statutes Annotated, tit. 68, § 2405(a) (1966).

[24] The colloquy between the Acting Chairman of the House Committee and Committee Counsel (*supra*, pp. 25-26) does not fully resolve the question. We understand Counsel to be suggesting that "some state courts" might require a popular referendum for repeal of even statutory disclaimers. But it does not follow that Section 6 leaves the matter there. On the contrary, it is arguable that, because some courts would require it anyway, the draughtsman decided to make a uniform rule, requiring popular acquiescence in all cases.

constitutional disclaimer, amendment *was* necessary, to authorize us to read those words as leaving it entirely up to the States whether they would simply disregard the impediment. And, of course, we know that, in the particular case of Washington, the responsible Committee expressly understood that "they do have a constitution there that requires this amendment in order that they can [assume jurisdiction]" (*supra*, p. 26).

c. We have seen what Section 6 "contemplates" as to the procedure by which constitutional disclaimers would be removed. But the provision does not stop there: it goes on affirmatively to *require* that this procedure be followed before any disclaimer State can assert jurisdiction. As we have seen (*supra*, p. 26), the inclusion of the proviso was questioned, but it was retained. The mandate is unequivocal: "the people" of the State must "appropriately amend[] their State constitution"—if the impediment is lodged there—or "the provisions of [the] Act shall not become effective." This is a strict requirement which cannot be avoided. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. As this Court said in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 178, in Section 6, "Congress * * * required * * * the amendment of those state constitutions which prohibit the assumption of jurisdiction * * * [and] the same goal [cannot be accomplished] unilaterally by simple legislative enactment." See, also, Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L.

Rev. 535, 568-575 (1975); Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 566 n. 339 (1976).

Yet, that is precisely what Washington has sought to do. Indeed, the State has not even purported *legislatively* to repeal or amend Article XXVI of its constitution. It has proceeded directly to take "affirmative legislative action" under Section 7 of Public Law 280, entirely by-passing Section 6. As a disclaimer State, Washington had no such option and its legislation [25] must accordingly be held of no effect.

How does Washington seek to escape this seemingly unavoidable conclusion? First, as we have seen, the State Supreme Court in *Tonasket* was persuaded to hold that Washington was not really a disclaimer State. This is more than a little surprising in light of the unanimous opinion in 1953, shared by Washington's own Representative on the relevant congressional Committee and apparently also by State officials (see *supra*, p. 26), that the State Constitution contained an impediment to asserting jurisdiction. But, it is true, the disclaimer States are not listed in Section 6 of Public Law 280 and it may be that the congressional assumption about Washington is not binding on this point. It is therefore appropriate to determine whether or not the State of Washington

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[25] Although the 1957 statute is not involved here because the Yakima Nation never consented to State jurisdiction under that law, we believe it stands on no better footing under Section 6 than does the 1963 statute directly at issue.

was in fact—as everyone said at the time—a disclaimer State.

3. *The correctness of the congressional understanding that the Washington Constitution contains an impediment to the State's assertion of jurisdiction over Indian country*

We submit that the Washington Supreme Court was plainly wrong in ruling that Article XXVI of the State constitution is no bar to asserting Public Law 280 jurisdiction.

a. It is, of course, conceded that Article XXVI is a mere transposition into the State constitution of a provision of the Enabling Act, which *required* its inclusion in the State's organic law. See *Tonasket* v. *State*, *supra*, 84 Wash.2d at 173, 525 P.2d at 752-753; *State* v. *Paul*, 53 Wash.2d 789, 791, 337 P.2d 33, 35; *Quinault Tribe of Indians* v. *Gallagher*, *supra*, 368 F.2d at 656-657. And it follows, as we have said, that the reach of Article XXVI is a question of federal law, to be determined by looking to the intent of Congress when it passed the Enabling Act of 1889.

The Act of February 22, 1889, 25 Stat. 676, provided for the admission of four new States, North Dakota, South Dakota, Montana and Washington. Section 1, 25 Stat. 676. But there were conditions. One such condition, common to all four States (Section 4, 25 Stat. 676-677, *infra*, pp. 1a-3a), was that the constitutional convention in each must "provide, by ordinances irrevocable without the consent of the United States and the people of said States":

> * * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * *

So far as is relevant to our question, identical language is to be found in the Enabling Acts covering Utah (28 Stat. 107, 108), Oklahoma (34 Stat. 267, 270), New Mexico (36 Stat. 557, 558-559) and Arizona (36 Stat. 569). This ought to give us pause. If the Washington Enabling Act and State constitution contain no impediment to the assertion of full criminal and civil jurisdiction over Indian country, then it follows that there were *no* disabled States. In that event, both the Executive and Legislative Branches of the national government must be charged with having written Section 6 into Public Law 280 to no purpose. But let us return to the language of the Enabling Act.

b. On its face, the provision plainly requires the new States to disclaim *both* any property interest over "Indian lands" *and* any jurisdiction to impose their own laws there.[26] To be sure, in *Draper* v.

[26] We assume the territorial scope of the disclaimer provisions reaches all "Indian country" as defined in 18 U.S.C. 1151. See *Seymour* v. *Superintendent*, 368 U.S. 351; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479. But that question need not be resolved here since the 1963 Washington statute clearly purports to reach Indians on their trust lands with respect to some matters.

United States, 164 U.S. 240, the present Enabling Act was held not to bar the State of Montana from trying a non-Indian for the murder of another non-Indian within a reservation, and in *Village of Kake* v. *Egan*, 369 U.S. 60, the Alaska Enabling Act (which included comparable language but had a limiting legislative history) was construed as permitting the State to apply general fishing regulations to the off-reservation activities of Indians.[27] But those cases have been explained as carving out special exceptions. See *Donnelly* v. *United States*, 228 U.S. 243, 271-272; *Williams* v. *United States*, 327 U.S. 711, 714; *Williams* v. *Lee*, 358 U.S. 217, 219-220; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 171-172, 176 n. 15. This Court has never held that these disclaimer provisions do not mean what they appear to say in precluding the attempted assertion of State jurisdiction to arbitrate disputes involving

[27] It is not clear why the Court discussed the Enabling Act disclaimer at all in this case since the Alaskan natives had, in any event, been subjected to State jurisdiction under the "mandatory" provision of Public Law 280. See Goldberg, *supra*, 22 UCLA L. Rev. at 571. Presumably, the Court was answering the argument that the Enabling Act was a "federal statute" immunizing Indian "property" from State regulation, which was accordingly exempted from State jurisdiction under Public Law 280. See 18 U.S.C. 1162(b), 28 U.S.C. 1360(b).

Indians within a reservation or other defined Indian community.

The Court, it is true, has had little occasion to construe the Enabling Act disclaimers. That is because the general rule, with only limited exceptions, has always been that, unless Congress has so provided, State authority does not reach "Indian country" even in the absence of an express disclaimer. *E.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 and n. 2. Yet, we are not lacking indications as to this Court's view of the import of such a disclaimer. For a century, whenever those provisions have been noticed, the Court has treated them as reserving to the United States at least the kind of jurisdiction embraced by Public Law 280. See *Ex parte Crow Dog*, 109 U.S. 556, 561 (dictum); *United States* v. *Sutton*, 215 U.S. 291, 295 (Washington, Yakima Reservation); *United States* v. *Sandoval*, 231 U.S. 28 (New Mexico, Santa Clara Pueblo); *United States* v. *Chavez*, 290 U.S. 357, 360 (New Mexico, Pueblo of Isleta); *Williams* v. *United States*, 327 U.S. 711, 714-715 n. 10 (Arizona, Colorado River Reservation); *Williams* v. *Lee*, 358 U.S. 217, 222-223 and n. 10 (Arizona, Navaho Reservation); *Seymour* v. *Superintendent*, 368 U.S. 351, 356-357 n. 13 (Washington, Colville Reservation); *Warren Trading Post* v. *Tax Comm'n*, 380 U.S. 685, 687 n. 3 (Arizona, Navajo Reservation); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (New Mexico, off-reservation Indian enterprise); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 175, 178 (Arizona, Navajo Reservation); *Fisher* v. *District Court*, 424 U.S. 382, 386 and n. 8 (Montana, Northern Cheyenne Reservation).

c. If further evidence is needed, we find it in the legislative history of the first of the disclaimer Enabling Acts, which formed the pattern for those that followed. As it happens, this is the Act authorizing the admission of Washington and three other States.

We need not rehearse the long and embattled history of this legislation. We may begin with the adoption of a constitution by the inhabitants of the southern portion of the Dakota Territory in 1885. In what concerns us, it provided (in Article XXII) only that the people of the prospective State disclaimed "all *right* and *title* to the unappropriated *public lands* of the United States lying within the State, and that the same shall be and remain at the sole and entire *disposition* of the United States" (emphasis added). See S. Rep. No. 15, 49th Cong., 1st Sess. 61 (1886). There is here no mention of Indian lands, nor any disclaimer of "control" or "jurisdiction" over them. Yet, at first, the Senate Committee on the Territories was satisfied that this comported with "the usual stipulations in the nature of a compact with the United States"—as indeed it did—and in two succeeding sessions the Committee reported bills that would have admitted South Dakota on this basis, without requiring any further disclaimer. S. Rep. No. 15, *supra*, at 3; S. Rep. No. 75, 50th Cong., 1st Sess. 6-10, 11, 65-66 (1888).

The House, however, balked. To be sure, the main point of disagreement was over the division of the Dakota Territory into two States. See the adverse reports of the House Committee on the Territories, in May 1886 and February 1888, annexed to H. R. Rep. No. 1025, 50th Cong., 1st Sess. 19-25 (1888). But when, at length, the House Committee favorably reported a measure (which would have authorized the admission of the Dakota Territory as a whole, as well as Montana, Washington and New Mexico), it took the occasion to specify in the proposed Enabling Act that each State would be required to adopt, at new constitutional conventions, irrevocable disclaimers in the very language now found in the constitutions of North and South Dakota, Montana and Washington. See 19 Cong. Rec. 2021 (1888); 20 Cong. Rec. 807 (1889). This was highlighted in the Report (H.R. Rep. No. 1025, *supra*, at 8-9): "Your committee desire to call attention to the fact that there are in the Dakota Territory large Indian reservations, which by the terms of the bill are *excluded* from the jurisdiction of the proposed State * * * and remain within the *exclusive* control and jurisdiction of the United States." See, also, *id.* at 2.

A month later, the Senate Committee, while still insisting (and ultimately prevailing) on the division of Dakota, adopted the disclaimer language of the House bill. 19 Cong. Rec. 2832 (1888). There was, it is true, very little notice taken of the new disclaimer in the floor debates. But there is one speech worth recording. The Dakota Delegate did not miss

the thrust of the disclaimer (20 Cong. Rec. 812-813 (1889)):

> There is another question here to which the gentleman has referred which requires special mention, and that is found in subdivision 2, of section 4, in reference to Indian lands and Indian property.
>
> * * * * *
>
> But I want to call attention now to the peculiar provisions of this subdivision of this section. I can not imagine where the gentleman from Illinois found them or what he drew them from. They are most extraordinary. Why, sir, under this subdivision if a man who has a single drop of Indian blood in his veins holds a section of land we can not even lay out a highway over it. We can not exercise any right of eminent domain over the land, no matter whether he has held it one year, or twenty-five years, or fifty years; and every man is held to be an Indian who has Indian blood in his veins, and there are many such in Dakota.
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> * * * * *
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> We are to recognize tribal relations in connection with Indians for only a very short time longer. Our proposed State can not submit or consent to any such provisions as these.

The Dakota Delegate recognized that the disclaimer required of his State—and of the other States covered by the bill, including Washington—went far beyond anything previously demanded as a condition of admission. But he was not contradicted, nor comforted by any suggestion that his fears were unfounded.

And, when the bill was eventually passed, the disclaimer provision remained unaltered—expressly disabling the new States from enforcing their laws in Indian country.

We may lay the matter to rest. Whatever the exact reach of the Enabling Act disclaimers, the Congress of 1953 correctly viewed them and the consequential State constitutional provisions as "legal impediments" to the assertion of jurisdiction under Public Law 280.

This conclusion, of course, undermines one of the Washington Supreme Court's grounds of decision.[28] But there was a second basis for the resolution of the disclaimer issue: that the constitutional disclaimer, if an obstacle, was effectively removed by the enactment of the 1963 statute. What of that alternative ground?

4. *The correctness of the congressional understanding that disclaimer States with a constitutional impediment would be required to remove it by amendment submitted to the whole people.*

We have already indicated why we believe Section 6 of Public Law 280 moots this question. In our view, the 83d Congress effectively determined that all the disclaimer States, including Washington, must

[28] The holding that Article XXVI of the Washington Constitution is no bar to the assertion of Public Law 280 jurisdiction was new in *Tonasket*. Both of the earlier State court decisions on the disclaimer issue assumed the contrary. *State* v. *Paul, supra; Makah Indian Tribe* v. *State*, 76 Wash.2d 485, 457 P.2d 590. So, also, the Court of Appeals for the Ninth Circuit in *Quinault Tribe* v. *Gallagher, supra,* assumed Article XXVI *was* an impediment that must be removed.

amend their constitution in the traditional way before assuming jurisdiction over Indian country. If that is true, it cannot matter whether the congressional premise was correct or not. Nevertheless, out of abundance of caution, we address the point.

a. At first blush, one is tempted to defer to the State Supreme Court on this point, reasoning that the process by which Washington amends its own constitution is a purely local matter. This inclination is increased as one confronts the difficulty of explaining how it is that Article XXVI, alone among the provisions of the State Constitution, can be overridden by an ordinary act of the legislature, passed by a simple majority, notwithstanding the amending Article which makes no such exception to the normal requirement of a popular referendum. Wash. Const., Art. XXIII (*infra*, pp. 5a-6a).[29] The temptation to avoid the question becomes almost irresistible as one appreciates the problem of sustaining the proposition that a constitutional provision entrenched as expressly "irrevocable" until the consent of both the United States "and the people of the State" has been obtained, is somehow less of a restraint on the State legislature than any merely declarative article

[29] The cited provision of the 1889 Constitution permits amendment by referendum or convention only after both houses of the State legislature have approved the proposed amendment, or the calling of a constitutional convention, by a two-thirds majority. In either case, the amendment must be submitted to popular approval. These requirements were in no way diluted by Amendment 37 to the Constitution, adopted by popular referendum in 1962.

of the organic law. See *State* v. *Paul, supra*, 53 Wash. 2d at 793-794, 337 P.2d at 36-37.[30] And, finally, there is strong reason to wish to be excused from resolving the problem whether the disclaimer clause of Article XXVI was effectively "repealed" in 1957 (as the Washington Supreme Court held in the *Paul* case) or in 1963 (as the federal court of appeals seems to have held in *Quinault*), and why, in either case, the provision is still retained intact in more recent compilations of the Washington laws, without any notation that it has been effectively repealed or amended. See, *e.g.*, 2 R.C.W.A. Const. (1966), pp. 304-306.

But we cannot avoid the issue by simply deferring to the State court. The reason, as before, is that Article XXVI of the Washington Constitution is not merely a stipulation of local law: the provision was framed in the federal Congress, included in the Enabling Act, and is part of a compact between the State and the United States. As we have already said, the consequence is that the true construction of Article XXVI is a question of federal law. And that includes the meaning of the words "irrevocable without the consent of the United States and the people of this state," which are in the Enabling Act. See *supra*, p. 39.[31]

[30] In *Makah* and *Tonasket* the Washington Supreme Court merely relied, as to this point, on the reasoning of *Paul*. See 76 Wash.2d at 490, 457 P.2d at 593; 84 Wash.2d at 178, 525 P.2d at 753. *Paul* itself relied on the earlier decision in *Boeing Aircraft Co.* v. *Reconstruction Fin. Corp.*, 25 Wash.2d 652, 171 P.2d 838, involving a different provision of Article XXVI. But, as the dissenting opinion in *Tonasket* points out, that is a doubtful precedent since the repeal of the portion of Article XXVI there involved was in fact ratified by popular referendum a few months after the decision. See 84 Wash.2d at 189, 525 P.2d at 759-760.

b. The question is: what did the Congress of 1889 intend by "the consent of * * * the people of the State"? On the face of the provision, the answer seems obvious. In normal usage, "the people" does not mean the legislature. The distinction is as old as the federal Constitution. Compare Article I, Section 2, with Article I, Section 3. And see Amend. X. Nor had it been abandoned in 1889. Indeed, the Article of the Washington Constitution of that year governing amendments speaks of the qualified electors as "the people" (Art. XXIII, secs. 1 and 3) as contrasted with the "legislature" (Art. XXIII, secs. 1-2).

Moreover, we must attempt to give some meaning to the requirement that "the people of the State" consent. Yet, that clause serves no purpose at all if the State legislature is free to assume jurisdiction over Indian lands as soon as federal consent is given. Were that the intent, it would have been enough to say that the disclaimer would be "irrevocable without the consent of the United States," without mentioning "the people of the State." It may be argued that, for the sake of appearances, the language of a bilateral contract was preferred. But, in that event,

[31] Because the Enabling Act applies to four States, the formula there is "* * * and the people of said States." Obviously, however, what is intended is "the people" of each State.

why not "without the consent of the United States and the State"? The "people" of the United States are not spoken of: why should the "people" of the State be mentioned, destroying the symmetry of the clause?

We can but assume the reason for expressly referring to "the people" was the same as that which underlay congressional insistence that the provision be adopted, in the first place, by the popularly elected constitutional conventions, then be ratified by a majority of the citizenry, and that the disclaimer itself be an agreement and declaration by "the people" of the proposed States. See *supra*, pp. 39-40. Congress evidently wished to entrench the conditions of admission as deeply as possible, binding every citizen of the new States, in a solemn undertaking by the people themselves, and defeasible only by them if and when the Congress consented.

c. But this is more than assumption. When we return to the legislative history of the Enabling Act that sanctioned the admission of Washington and three other States, we are left in no doubt that when the Congress spoke of "the people" of the State it meant all eligible voters, not the legislature. So far as we can determine, in the long debates over the admission of these States, not a single speaker confused the two things. See 19 Cong. Rec. 2802-2808, 2831-2838, 2880-2889, 2909-2915, 2996-3004, 3037-3043, 3081-3093, 3117-3140 (1888); 20 Cong. Rec. 795-797, 798-828, 862-873, 899-915, 934-952 (1889).

While the disclaimer clause provoked little discussion (but see *supra*, pp. 44-45), there was heated debate both in the House and Senate about the appropriate procedure for admitting the proposed States. This furnished ample opportunity for Representatives and Senators to make clear what they meant by "the people." *E.g.*, 19 Cong. Rec. 2804, 2883, 3001, 3117, 3120, 3135, 3136 (1888); 20 Cong. Rec. 801, 869 (1889).

Two examples are perhaps sufficient as illustrating both the meaning attached to the term and the prevailing view that a State constitution, or any alteration of it, must be ratified by a popular vote. The first is the statement of Senator Platt, the Chairman of the Committee on Territories and floor-leader for the bill. In presenting the bill to the Senate he explained that the southern part of the Dakota Territory had already framed a constitution, approved by popular vote, but that "minor changes"—of boundary and name—were now proposed (19 Cong. Rec. 2804 (1888)).[32] Senator Platt continued (*ibid.*):

> This of course changes the constitution and necessitates the acceptance by the people of the constitution as thus changed, which is provided for in the last four sections of the bill; and that being necessary, the committee have thought

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[32] This was before the Senate Committee accepted the clauses of the House bill, which would require further changes in the State constitution. 19 Cong. Rec. 2832 (1888). See *supra*, p. 44.

proper to provide that the whole constitution should be resubmitted to the people.

A second illustration of the congressional view is Senator Plumb's criticism of an attempt to admit the State of Kansas without popular approval of the draft constitution (19 Cong. Rec. 3117-3118 (1888)):

> After the adoption of that constitution by the convention in the fall of 1857 and the failure to submit its work to the people, the Legislature of the Territory of Kansas submitted the question directly to the people as to whether they desired admission into the Union under the Lecompton constitution, and at an election held for that purpose on the 4th day of January, 1858, nearly nine-tenths of the people of Kansas voted against such admission and repudiated the constitution utterly. Yet, on the 2d day of February following, President Buchanan sent that constitution to Congress, himself alluding to the fact that it did not represent the people of the Territory and to the fact that it had been voted down by a large majority of the people, and he excused himself for thus asking that the will of the people should be overridden by saying that it was common for people to commit to their representatives the exercise of authority which they did not afterwards desire nor expect to pass in judgment upon.
>
> The Senator will remember the struggle which ensued the effort to admit the State under a constitution which not only had been adopted in violation of the expressed wish of the people of

> the Territory, which had been voted down by them by an overwhelming majority, but a constitution which in terms fastened upon them an institution which they held in utter and eternal abhorrence, and which their presence in the Territory of Kansas was a protest against.

Enough has been said to show what the 50th Congress meant by "consent of the people." If more were required, we would point to the Enabling Act itself. It not only prescribes in some detail the manner in which the constitutional conventions shall be held (Sections 3-5, 25 Stat. 676-678), but requires in each case that the newly framed constitution be submitted to popular approval. Sections 3, 5, 7, 8, 25 Stat. 676-679. Plainly, the Congress of 1889 was clear that "the people" of each new State should speak for themselves and not through their legislatures.

We conclude that the "consent of the people" in the Washington Enabling Act, and, therefore, in Article XXVI of the Washington Constitution, meant what it said, the acquiescence of a majority of the eligible citizens, voting for themselves, not "the state of Washington speaking through the legislature." Once again, those who framed Public Law 280 were correct in assuming that the State constitution contained a "legal impediment" that must be removed by constitutional amendment in the usual way.

The conclusion that Washington has not effectively removed the bar of Article XXVI excuses us from reaching the difficult question already adverted to under the Due Process and Equal Protection Clauses:

whether, consistently with those federal constitutional provisions, the State could fashion a special, less scrupulous, rule for overriding an impediment in its own constitution, applicable only when Indians are involved. See *supra*, p. 20. Instead, we turn briefly to the suggestion that, however correct, our submission comes too late: that settled arrangements ought not be disturbed by a belated discovery of the true meaning of Section 6 of Public Law 280.

5. *Practical and equitable considerations*

a. At the outset, it is right to stress that the Indian Tribes of Washington cannot be held guilty of laches in raising the disclaimer issue. The first of the disclaimer States to invoke Public Law 280 was Washington in 1957. But the statute enacted in that year asserted State jurisdiction only with tribal consent. Those Tribes that petitioned for State protection under that law were not in the best position to challenge it as *ultra vires*. Even so, an individual member of the one of the Tribes within the Tulalip Reservation did assert the disclaimer argument as early as 1958, only to have the State Supreme Court reject it. *State* v. *Paul*, *supra*. Other, non-consenting Tribes, including the Yakima Nation, lacked standing to complain, being unaffected by the 1957 statute.

State jurisdiction regardless of tribal consent was first asserted in 1963, by the Washington statute now before the Court. It was promptly challenged by the Quinault Tribe in the federal courts, *inter alia*, on the disclaimer issue. Both the district court and the

court of appeals denied the claim and the Tribe petitioned for ceriorari. But this Court declined to hear the case. *Quinault Tribe* v. *Gallagher*, *supra*.[33] Nevertheless, the Tribes continued to press the contention that the 1963 Washington statute was unauthorized because the State had failed to amend its constitution. On three occasions, the issue was at least potentially in cases that reached this Court. *Makah Tribe* v. *Washington*, *supra*; *Tonasket* v. *Washington*, *supra*; *Comenout* v. *Burdman*, *supra*. For varying jurisdictional or jurisprudential reasons, however, the Court did not resolve the question.

None of the other disclaimer States has succeeded in unilaterally asserting exclusive jurisdiction over Indian country,[34] and, since 1968, none can. This

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[33] The United States shares some responsibility for that disposition. Although we urged the Court to grant the petition for certiorari, *inter alia*, on the disclaimer issue, we suggested that the court of appeals had correctly rejected the claim. See Memorandum for the United States in No. 1040, O.T. 1966, pp. 6-7.

[34] We put to one side Arizona's very limited assertion of water and air pollution jurisdiction within reservations. See *McClanahan* v. *Arizona State Tax Comm'n.*, *supra*, 411 U.S. at 177-178 n. 17. Without expressing a concluded view on the matter, we submit that is arguably within the principle of the rule condoned by *McBratney* and *Village of Kake*, *supra*. We note, however, that in 1964 Montana, acting with tribal consent but without constitutional amendment, asserted criminal jurisdiction over the Flathead Reservation. See *Kennerly* v. *District Court*, *supra*, 400 U.S. at 425. That statute was unsuccessfully challenged in the State courts. *McDonald* v. *District Court*, 159 Mont. 156, 496 P.2d 78. A limited provision asserting criminal and civil jurisdiction over high-

Court's 1973 opinion in *McClanahan* v. *Arizona State Comm'n.*, *supra*, 411 U.S. at 177-178, might well have been read as sustaining the disclaimer argument. At least until the subsequent Orders in *Tonasket* and *Comenout* two years later, the Tribes of the disclaimer States may be excused for believing they had won the point. Yet, in Washington, their apparent success was not acknowledged and, once again, one of the affected Tribes has raised the issue.

Plainly, no one can charge that the Indians have not made prompt and repeated efforts to interpose the disclaimer objection to State assertion of jurisdiction over them. The State of Washington, on the other hand, has had ample opportunity to moot the argument by simply submitting the question of assuming jurisdiction over Indian country to its own citizens. But it is said that, equities aside, now to unsettle arrangements long in existence would be too disruptive. We examine that claim.

b. In our view, the matter has been grossly overstated. To begin with, except for the very narrow pollution control asserted by Arizona, perhaps consistently with its disclaimer (see note 34, *supra*), Washington and Montana are the only disclaimer States that had effectively assumed new jurisdiction over Indian country under Public Law 280 before 1968. Even if we treat Idaho as in the same category, the practical situation there is markedly dif-

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ways within Indian Reservations in South Dakota was, on the contrary, struck down by the State Supreme Court. *Petition of Julia Hankins*, 80 S.D. 435, 125 N.W.2d 839.

ferent since, as we are told, the tribal courts in fact exercise jurisdiction over those matters which the State claims concurrent power to deal with (see J.S. 59). There are, to be sure, statutes in Utah, Idaho, Montana and indeed Washington, enacted before 1968 or since, that provide for State jurisdiction with tribal consent; but, Washington and Montana aside, no valid consent has been given. And see *Kennerly* v. *District Court*, *supra*.[35] As a practical matter, then, the only arguable "disruption" resulting from sustaining the disclaimer argument will occur in Washington and on the Flathead Reservation in Montana, where only criminal jurisdiction is involved.

Turning to Washington, there are some 20,000 reservation Indians, distributed between 23 distinct reservations. The two largest groups, by far, are the Yakimas and the Colville, together accounting for well over half the reservation Indians of the State. Ten of the Tribes, including the Colville, have consented to full State jurisdiction. As to them, numbering some 8,000, the *status quo* may continue, provided only the people of the State and the members of the Tribe are willing. For the rest, half of whom belong to the Yakima Nation, they would of course welcome an end to State intervention, which, in any event, is only very partial protection. Indeed, in their case,

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[35] In *Kennerly*, this Court held ineffective an attempted assertion of State jurisdiction over the Blackfeet Tribe in Montana, which was predicated, not on a State statute, but on a tribal ordinance which had not been submitted to the members for approval.

law enforcement would be much simplified by the termination of State jurisdiction under Public Law 280. At present, the unconsenting Indians of Washington are subject to three sovereignties, according to a complex checkerboard pattern that is so difficult to master that a schematic chart is needed to illustrate it. See Appendix B, *infra*. Henceforth, in all that directly affects them, jurisdiction would be divided along relatively clear lines between federal and tribal authorities. In light of the confused and concededly unsatisfactory situation now prevailing, it may be doubted if the ruling we urge upon the Court would have any substantial "unsettling" effect.

c. Finally, we ought not lose sight of the fact that national policy for a decade at least has been to encourage Indian self-government, prohibiting State interference in Indian affairs except with the full consent of the affected Tribe. While Congress did not require States validly asserting jurisdiction over Indian country before 1968 to retrocede it or obtain tribal acquiescence for its continuance (25 U.S.C. 1323(b)), that result was encouraged. See 25 U.S.C. 1321(a), 1322(a), 1323(a), 1326. Considering that the hearings on the Indian Civil Rights Act began as early as 1961, it is something of a historical accident that Washington assumed partial jurisdiction without tribal consent in 1963, before Congress had finally settled on legislation to forbid such unilateral State action for the future. Of course, if Washington's law is valid, the State is entitled to maintain it notwithstanding Indian objection and the resulting friction.

But we cannot properly overlook a flaw, even if only procedural. See *Kennerly* v. *District Court, supra.* It cannot be improper to urge the Court to notice the invalidity of State action which promotes discord and contravenes the now settled policy of the Nation.

II. THE PARTIAL JURISDICTION ISSUE

If we assume (notwithstanding the submission just concluded) that Washington's failure to repeal or amend Article XXVI of the State Constitution was no bar to asserting jurisdiction, the question arises whether the State was free to assume only *partial* jurisdiction over Indian reservations within the State. The issue has both a statutory and a constitutional dimension. As we have seen, the court of appeals *en banc* (by a vote of 7 to 5) rejected the argument that Public Law 280, before its amendment in 1968, did not authorize the kind of selective jurisdiction asserted by Washington in 1963, whereas, on remand, a panel of the same court held the State statute violative of the Equal Protection Clause. For our part, we address only the statutory question—albeit with an eye to the constitutional objections that would be presented if Public Law 280 were construed as permitting the result Washington has sought to achieve in its 1963 legislation.

In answering the question whether Public Law 280, as originally enacted, authorized the option States to assert only partial jurisdiction, we first focus on Washington's legislation. In 1963, a very complex scheme was enacted, State criminal jurisdiction some-

times depending on the race and age of the offender, the nature of the crime, and the title status of the land where it occurred. After noting the practical consequences of the legislation, we ask ourselves whether the Congress of 1953 meant to condone such a confused result. Examining both the text of Public Law 280 and other evidence, we conclude that Washington's 1963 law is *ultra vires*.

A. The Washington Legislation

1. Although only the 1963 State statute is directly involved, it is useful to look briefly at the earlier legislation. Washington first invoked the authority given it by Public Law 280 in 1957. In that year, the State enacted Chapter 240, Laws 1957 (*infra*, pp. 12a-14a), by which it bound itself to assume "criminal and civil jurisdiction" over the persons and lands of any Indian Tribe whose governing body [36] expressed a desire to "be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law." §§ 1 and 2. Sixty days after receiving such a resolution from the Tribe, the State Governor was to issue a proclamation "to the effect that such [criminal and civil] jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body in-

[36] Interestingly, an exception was made for the Colville, Spokane and Yakima Reservations. In those special cases, a resolution of the tribal council was ineffective unless ratified by two-thirds of the adult enrolled members. See § 2 proviso.

volved" (§ 2), and, after a further 60 days, State criminal and civil jurisdiction would take effect, both criminal and civil laws henceforth having "the same force and effect" within the designated Indian country as elsewhere in the State. §§ 3 and 4.

Significantly, no provision was made for the State to assume only partial jurisdiction. On the face of the 1957 statute, the only choice would seem to be full criminal and civil jurisdiction over all persons [37] and all lands within any reservation. And, so far as we are advised, the nine Tribes that elected State jurisdiction before 1963 came fully under State law.[38] See *Tonasket* v. *State*, *supra*, 84 Wash.2d at 166-167 n. 2, 525 P.2d at 746 n. 2. It seems probable that, at the time, the Washington legislature read Public Law 280 as forbidding a selective assertion of jurisdiction, except only as it condoned including or excluding an entire reservation.

2. There was, however, a change of mind in 1963, when the present law was enacted. Although Tribes might still petition for subjection to State law (RCW

[37] Section 3 expressly referred to "offenses committed by or against Indians" and Section 4 to "civil causes of action between Indians or to which Indians are parties." Presumably, disputes not involving Indians were already deemed subject to State jurisdiction under the *McBratney* rule. See note 2, *supra*.

[38] The Swinomish Tribe chose to submit to the State criminal jurisdiction only, but that was under the 1963 law which expressly gives this option. RCW § 37.12.021, *infra*, p. 16a. The Colville Tribe, although electing State jurisdiction only in 1965, elected full criminal and civil jurisdiction.

§ 37.12.021, *infra*, p. 16a),[39] the State now purported to assert some jurisdiction regardless of tribal consent. Henceforth, full State criminal and civil jurisdiction attached to all *unrestricted* lands within every Indian reservation and to everything that happened there, whether involving Indians or not. But, absent tribal acquiescence, Indians[40] generally remained beyond the reach of State law when on tribal lands held in trust by the United States or allotted lands subject to a restriction against alienation. To this exemption, however, there were eight exceptions: for certain matters, including juvenile delinquency and motor traffic regulation, the State asserted jurisdiction over everyone, everywhere.[41] RCW § 37.12.010, *infra*, p. 15a.

We cannot state with assurance the precise impact of the 1963 law for those Tribes, like the Yakima, who never agreed to State jurisdiction. But, accepting the State's construction of its own statute, and limiting ourselves to criminal cases arising within the boundaries of a reservation, the following results, at least, seem clear:

(a) State jurisdiction sometimes depends on the *race* of the offender[42] (*e.g.*, the assault of an Indian on tribal trust lands is a State offense if committed by a non-Indian, but not if the offender is himself an Indian);

(b) State jurisdiction sometimes depends upon the *age* of the offender (*e.g.*, the assault of

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[39] As already noted, the new optional provision apparently permitted a Tribe to submit to only criminal or only civil jurisdiction. The special proviso with respect to the Colville, Spokane and Yakima Reservations (see note 36, *supra*) was deleted.

[40] The scope of the exemption is not entirely clear. Because the provision recites that State jurisdiction "shall not apply *to Indians* when on their [restricted] lands" (RCW § 37.12.010, *infra*, p. 15a), we assume a non-Indian committing an offense against an Indian on trust land is subject to State law, as the State apparently maintains (see Wash. Br. 6, 38). Arguably, however, another section of the statute indicates that the exemption embraces all offenses on trust lands "by or against Indians." See RCW § 37.12.030, *infra*, p. 16a. In civil litigation, on the other hand, we suppose State jurisdiction does not reach a dispute arising on Indian trust lands whenever an Indian is a party, whether as plaintiff or defendant. See RCW § 37.12.040, *infra*, p. 17a.

[41] The other excepted categories are: "(1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; * * * (6) adoption proceedings; [and] (7) dependent children * * *."

[42] We use the term "race" as shorthand, although it is not strictly accurate. First, we assume Washington's law treats as "Indians" only members of federally recognized Tribes. See *Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24; *United States* v. *Antelope*, 430 U.S. 641, 646 n. 7. Indeed, it may be that the partial exemption from State jurisdiction embraces only those entitled to membership in the particular Tribe assigned to the reservation, regardless of full Indian blood. See *Santa Clara Pueblo* v. *Martinez*, No. 76-682, decided May 15, 1978. On the other hand, a person with no Indian blood may be deemed an "Indian" for jurisdictional purposes if "adopted" . . "naturalized" by a Tribe. See *Alberty* v. *United States*, 162 U.S. 499; *Nofire* v. *United States*, 164 U.S. 657; *Cherokee Intermarriage Cases*, 203 U.S. 76.

an Indian by another Indian on tribal trust lands is a State offense if committed by a minor, but not if the offender is an adult);

(c) State jurisdiction sometimes depends on the *status of the land* where the incident occurs (*e.g.*, the assault of an Indian in his home by another Indian is a State offense if the victim holds his land by an unrestricted fee patent, but not if it remains subject to a restraint against alienation);

(d) State jurisdiction sometimes depends upon the *subject matter* (*e.g.*, an Indian who violates the traffic code on tribal trust lands commits a State offense, but the same person in the same place is not amenable to State law if he assaults another person (whether Indian or non-Indian)).

3. To be sure, one can find precedents in Indian law for jurisdiction based on race (*e.g.*, 18 U.S.C. 1152, 1154), or subject-matter (*e.g.*, 18 U.S.C. 1153), or title to land (*e.g.*, 18 U.S.C. 1151(c), 1154(c)), and age is not an unusual criterion for determining which tribunal has competence. But, so far as we are aware, the Washington scheme is unique in bringing into play all four factors within any single Indian reservation.[43]

The 1963 statute under consideration re-introduces for all reservations where some lands are held in fee and the Tribe had not consented to full State jurisdiction the "impractical pattern of checkerboard juris-

[43] See note 50, *infra*, p. 75.

diction" which requires "law enforcement officers operating in the area * * * to search tract books" in order to determine whether an offense is within their competence. *Seymour* v. *Superintendent*, 368 U.S. 351, 358; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478. Nor is this all. Unless the matter clearly falls within one of the eight special categories, State or County police investigating a crime determined to have occurred on restricted land must still ascertain whether the probable offender is or is not an Indian, and if so, whether he is a juvenile. And like determinations must be made by federal and tribal officers, since under the Washington law all three sovereignties retain some criminal jurisdiction within Indian reservations. See Appendix B, *infra*.

Not surprisingly, the upshot is inefficient criminal law administration. No doubt, cooperative arrangements might alleviate the problem; but, obviously enough, the incentive for such agreements, and their good faith implementation, is lessened when the division of jurisdiction is not consensual, but imposed by the State over tribal objection.

4. Such are the consequences of Washington's 1963 law. Of course, the Tribes that have not done so may resolve the chaos by allowing the State to assume full jurisdiction. That option was once invoked by the Court of Appeals for the Ninth Circuit, and subsequently by the Washington Supreme Court, as a ground for holding that the 1963 statute did not work a partial assumption of jurisdiction. See *Quinault Tribe of Indians* v. *Gallagher*, *supra*, 368

F.2d at 657-658; *Makah Indian Tribe* v. *State*, *supra*, 76 Wash.2d at 492, 457 P.2d at 594. In this case, however, the court of appeals has abandoned reliance on that rationale (see J.S. 39-40, 42-45, 48-49) and, in this Court, the State—albeit with occasional lapses (Wash. Br. 36, 38, 42)—seems to accept that Washington's 1963 scheme must be treated as asserting limited jurisdiction only.

This is plainly right. The State, not the affected Tribes, unilaterally decided in 1963 to assert partial jurisdiction.[44] To be sure, the Tribes were then told, "if you wish, you can make our jurisdiction total, especially if you find that the crazy quilt we have created for you is wholly unsatisfactory." At least two of the Washington Tribes have succumbed, preferring total immersion to being doused with cold water. But no one will suggest that a wholly free choice was involved. To use an extreme, but not wholly remote, analogy, it is like saying to parents, "we will separate you from your children, unless of course you too will submit to our care." In those circumstances, it would be disingenuous to estop the

[44] There is no evidence that in 1963 the Washington Tribes who had not then consented to State jurisdiction asked to have their trust lands partially excluded. We do not know what informed the legislative decision. But it may be that the State was reluctant to incur the burden of assuming general criminal jurisdiction over intra-tribal offenses in areas closed to non-Indians and therefore of less concern to other residents of the reservation. The continuing option of full jurisdiction, it may have been supposed, was unlikely to be invoked by any Tribe that had resisted the invitation since 1957.

parents from challenging the separation because they held the key to the problem in their own hands. So here. If Public Law 280 condemns partial assumption of jurisdiction, the State's action is not immunized because the affected Tribes *could* cure the defect if they were willing, as they are not, to abandon the free choice which Congress secured to them in 1968 to retain what little measure of self-government is left to them.

We have said enough. Washington's 1963 law must stand or fall as a partial assumption of State jurisdiction. The question is whether the Congress of 1953 meant to authorize such a piecemeal erosion of Indian reservations. We think not.

B. The Options Contemplated by Public Law 280

In our submission, Public Law 280 did not authorize the option States selectively to assert partial jurisdiction over Indian reservations. Although the matter is open to question, we believe those States were free to assume jurisdiction over some reservations and not others. So also, it is arguable that only criminal, or only civil, jurisdiction might be asserted. But in our view, the option States were given no other choices. This conclusion is, we suggest, compelled by both the text of Public Law 280 and such pointers as there are in the legislative history of the original Act and its amendment in 1968.

1. *The Text of the Statute*

We may begin with Sections 6 and 7 of Public Law 280, applicable to option States like Washing-

ton."[45] What is immediately apparent is that those Sections are not complete in themselves. The "civil and criminal jurisdiction" spoken of in Section 6 is not there defined: we are merely told that it is to be "in accordance with the provisions of this Act." And, similarly, in Section 7, for the meaning of "jurisdiction with respect to criminal offenses or civil causes of action," we are referred elsewhere: "as provided for in this Act." Indeed, read in isolation, Sections 6 and 7 do not even disclose that Indians or Indian country are involved. And so, we must turn to the other substantive provisions of Public Law 280, Sections 2 and 4.

It is only by looking to those Sections that we learn that the "criminal jurisdiction" mentioned in Sections 6 and 7 embraces all "offenses committed by or against Indians in * * * Indian country," and that "civil jurisdiction" connotes "civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country," except only that the State is not free to alienate, encumber or tax restricted Indian property, or to infringe Indian hunting and fishing rights guaranteed by treaty or

[45] Section 6, as we have sufficiently explained, is uniquely applicable to the so-called disclaimer States. But it may well be, as has been generally assumed (see J.S. 41 n. 3, 52 n. 6), that Section 7 applies to all option States, both those subject to Section 6 and those without "legal impediments" to assuming jurisdiction. Thus, a disclaimer State (like Washington) would *first* comply with Section 6 by amending its constitution, and *then*, under Section 7, enact "affirmative legislative action."

federal statute. What is more, Sections 2 and 4 tell us that the consequence of assuming "criminal and civil jurisdiction" is that the State "criminal laws" and "civil laws * * * of general application," henceforth, "shall have the same force and effect within such Indian country as they have elsewhere within the State," and that the special federal criminal jurisdiction provisions (18 U.S.C. 1152, 1153) cease to be applicable.

In the absence of any hint in the text that partial State jurisdiction was contemplated, the natural reading of the relevant Sections of Public Law 280 is that the option States were given consent to place themselves in the same posture as the mandatory States—nothing more or less. Very probably, since entire reservations were exempted in three of the mandatory States, the same kind of exemption was intended to be left open to the option States. Perhaps these States were not required to assume *both* criminal and civil jurisdiction.[46] But there is no basis for

[46] The argument for this choice is based on the reference in Section 7 to "jurisdiction with respect to criminal offenses *or* civil causes of action, *or* with respect to both." But the quoted clause directly adverts only to that jurisdiction which the State lacks. Obviously, where the particular State already enjoyed criminal jurisdiction over a reservation (as in the case of North Dakota with respect to the Devils Lake Reservation, 60 Stat. 229), the effect of Public Law 280 would only be to permit the State to assert civil jurisdiction as well. Although Counsel to the House Committee apparently read it otherwise (see 1953 Hearings at 24), the disjunctive in Section 7 may well be intending nothing more than to allow States to make their jurisdiction "full." Section 6, we note, speaks of the "assumption of civil *and* criminal jurisdiction," and it will not

reading into the Act a complete freedom for the option States to pick and choose at will, redefining "Indian country," limiting criminal jurisdiction to offenses "against" Indians but not "by" them, or selecting only some "criminal laws" for enforcement on reservations.

We think it plain that authority for such a result cannot be found in the clause of Section 7 which permits an option State "to assume jurisdiction at such time and *in such manner* as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof." We have already adverted to the probable purpose of the clause: to allow the decision to be made with or without referral to popular approval, as the State chose. We may assume that "in such manner" also condoned a procedure whereby the consent of the affected Tribes would be made a condition of assuming jurisdiction. But "in such manner" cannot be made to do service for "to such extent."

In our submission, Public Law 280 on its face forecloses the kind of selective jurisdiction asserted by Washington in 1963. But we need not rest on the text alone. Other evidence confirms our conclusion.

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do to suggest that the following words, " 'in accordance with the provisions of this Act,' " are merely a reference to Section 7 (Wash. Br. 46 n. 18): the relevant "provisions" must include Sections 2 and 4, which require the mandatory States to assume both civil and criminal jurisdiction.

2. *Other Evidence of Congressional Intent*

a. When we reexamine the legislative history of Public Law 280 for some indication on the partial assumption issue, we first notice the total absence of any suggestion that State jurisdiction, where asserted, would be less than full. To be sure, with respect to the mandatory States, some reservations were wholly exempted, and, as we have said, we assume the option States were free to do likewise. As the State points out (Br. 45), the Committee Reports suggest that Section 7 left that door open. H. R. Rep. No. 848, *supra*, at 7; S. Rep. No. 699, *supra*, at 6. But, except for total exemption of an entire reservation (or perhaps all that part of a reservation within a county),[47] it is nowhere intimated that a State would be free to impose only *some of its criminal laws*, or reach only *some of the residents* of an included reservation, or assert jurisdiction over only *some plots* within it.

This silence is not neutral. Indeed, we know that some States, notably Nevada, were reluctant to assume jurisdiction over Indian country because of the heavy financial burden involved. Congressman Young of Nevada made the point, urging a federal subsidy and objecting to the inclusion of his State among

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[47] The portion of the Report quoted by the State (Br. 45) can be read as impliedly condoning a county-option plan which could result in bringing under State jurisdiction only part of a reservation when the reservation overlaps county lines. On the other hand, it may be that the Report is merely explaining the Nevada dilemma and suggesting that time is needed for the State as a whole to reach a decision.

the mandatory States when that was not forthcoming. 1953 Hearings at 7-8, 33. And others noted the same objection. *Id.* at 10, 11, 23, 26, 30; H.R. Rep. No. 848, *supra*, at 7. This, it would seem, was the occasion for someone to respond that Nevada and other similarly-situated States need not assume full jurisdiction, that they might selectively impose only some of their laws, avoiding the heavy expenditures that were feared. But there was no such interjection. Repeatedly, speakers mentioned "jurisdiction," or "civil and criminal jurisdiction," without qualification. 1953 Hearings at 3, 4, 6, 9, 10, 12, 17, 23, 26, 28; 99 Cong. Rec. 10782, 10783 (1953). See also H.R. Rep. No. 848, *supra*, at 6-7. And, with particular reference to Nevada, one Committee Member commented: "If Nevada does not want to take this on and does not feel they should be obligated to take this expense, they certainly do not need to pass any legislation to take it on." 1953 Hearings at 30. Likewise, the Report referred to by the State (Br. 45) adverts to such States "acquiring jurisdiction in the future." There is no suggestion that reluctant States might "take on" only "a part" of the jurisdiction now tendered.

b. The focus of the 83d Congress on full-fledged assumption of jurisdiction by the States is entirely consistent with the premises underlying Public Law 280. We can identify at least three concerns informing congressional action in 1953: (1) a view that Indians ought, so far as possible, be "assimilated" into the general population; (2) a desire to diminish

federal responsibility for the Tribes, with the attendant cost to the national treasury; and (3) the prevailing hiatus in law enforcement on most reservations. Each of these considerations counseled a total, not a partial, transfer of jurisdiction to the States.

What has been called the "termination fever" [48] of the period had almost reached its full maturity in 1953. To be sure, Public Law 280 did not itself abolish reservations or the treaty rights of the Tribes, and it was still possible to wholly exempt certain reservations from State jurisdiction. Moreover, as we have seen, some States remained hesitant to assert jurisdiction, at least without the power to tax Indian property or a compensating federal subsidy. But, within those limits, the congressional mood was plainly in favor of ending the special status of Indians and to pull down the reservation fences that kept out State law. See 1953 Hearings at 5, 15, 16; H.R. Rep. No. 848, *supra*, at 3-5. That goal, obviously enough, argued for the fullest assertion of State jurisdiction: it would be little, if at all, advanced by selective and limited imposition of State laws.

It is equally clear that the objective of disentangling the federal government from its responsibilities towards the Tribes, and lessening its financial burden (see 1953 Hearings at 7; 99 Cong. Rec. 9263 (1953)), would be better served if the States, when they asserted jurisdiction, did so fully. If the States were

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[48] American Indian Policy Review Commission, *Final Report*, vol. 1, p. 199 (1977).

free to pick and choose, there was a risk that some might not take the sour with the sweet, leaving the national government with the most burdensome obligations.

But the most vocalized concern underlying Public Law 280, as this Court has noted (*Bryan* v. *Itasca County*, 426 U.S. 373, 379), was "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." See, also, 1953 Hearings at 2-3, 15-16; H. R. Rep. No. 848, *supra*, at 5-6. This "complete breakdown of law and order," to borrow Congressman D'Ewart's phrase,[49] had several causes. As one commentator has explained, "federal law enforcement was typically neither well-financed nor vigorous." Goldberg, *supra*, 22 UCLA L. Rev. at 541. Moreover, as the Committee Reports point out (H.R. Rep. 848, *supra*, at 5), federal jurisdiction did not reach offenses by Indians against Indians except for the 10 "major crimes." See 18 U.S.C. 1152, 1153. And the consequence was that, "[a]s a practical matter, the enforcement of law and order among the Indians in the Indian country ha[d] been left largely to the Indian groups themselves." H.R. Rep. No. 848, *supra*, at 6. Yet, "[i]n many States, tribes [were] not adequately organized to perform that function," thereby producing "a serious hiatus in law-enforcement authority." *Ibid.*; see also 1953 Hearings at 2-3.

[49] Hearings on H.R. 459, H.R. 3235, and H.R. 3624 (State Legal Jurisdiction in Indian Country) before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess. 16 (1952).

Plainly, this "hiatus" would not be removed if States were free to forego assuming jurisdiction in cases where both victim and offender were Indians or where the offense occurred on trust lands. Indeed, it would be very strange if the Congress were now condoning a return to the "checkerboard" jurisdiction that it had largely eliminated only five years earlier. See Act of June 25, 1948, 62 Stat. 683, 757.[50] Nor was it intended that existing federal jurisdiction should complement any new assertion of State jurisdiction. The understanding was that wherever the State assumed jurisdiction, federal criminal law would cease to apply, federal jurisdiction having been "ceded" to the State. 1953 Hearings at 6.

In sum, it may be surmised that the Congress of 1953 was attempting to simplify and rationalize the administration of law on Indian reservations by eliminating at least one limited jurisdiction and subjecting all residents to a single legal system.[51] That aim

[50] Public Law 280 uses the term "Indian country," which includes all land within a reservation, as the House Committee was well aware. See 1953 Hearings at 5, 16. To be sure, some "checkerboarding" inevitably continues with respect to trust lands *outside* a reservation, 18 U.S.C. 1151(c), and that consequence was an inadequate deterrent to the termination of Indian reservations at the turn of the century. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 446-447; *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 590, 615 and n. 48. But it hardly follows that in 1953 Congress was giving the States leave to undo the substantial corrective work it had just undertaken.

[51] We need not reach the question whether Public Law 280 intended to allow *tribal* jurisdiction to subsist concurrently. Doubtless, that was not viewed as a very "live" issue in 1953: Congress was itself exempting for the mandatory States—

could only be defeated by permitting the State to assume only partial jurisdiction within Indian country. Such was the conclusion of the South Dakota Supreme Court in condemning a statute that—with far greater justification and simplicity—asserted full criminal and civil jurisdiction only over highways running through Indian reservations. *Petition of Julia Hankins*, 80 S.D. 435, 125 N.W.2d 839. What was said there applies with added force to the "crazy quilt" created by Washington's 1963 statute (80 S.D. at 443, 125 N.W.2d at 843):

> It seems to us that this legislation does not tend to accomplish or promote the congressional purposes of Public Law 280. To the contrary, it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction where the Federal and Tribal courts already operate, each with limited subject matter jurisdiction.[52]

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presumably contemplating that the other States would do likewise—reservations with functioning tribal law enforcement mechanisms; for the rest, unlike today, there were few active tribal courts.

[52] Also worth noting is an earlier passage from the same opinion (80 S.D. at 442, 125 N.W.2d at 843):

> The title of [Public Law 280] refers to conferring jurisdiction with respect to criminal offenses or civil causes of action committed or arising on an Indian Reservation. Nowhere in the act is it expressly stated that a state could assume jurisdiction over only a portion or part of a reservation.
>
> In defining Indian country in 18 U.S.C.A. § 1151, rights of way running through the reservation are specifically mentioned as being a part of the reservation. We think it reasonable to believe that if the Congress had intended that under Section 6 of Public Law 280, the states could assume jurisdiction over only highways on a reservation, that it would have said so. It is for the Congress and not for us to spell out the manner in which the states may assume the jurisdiction which it relinquished.

c. It remains to deal with the 1968 amendment of Public Law 280 and what was then said about the scope of the original Act. As this Court need hardly be reminded (see, *e.g.*, *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 428-430), Title IV of the Civil Rights Act of 1968 (82 Stat. 78, 25 U.S.C. 1321-1326) (*infra*, pp. 19a-23a) amended Public Law 280 in significant respects. Primarily, tribal consent to the assertion of any new State jurisdiction was henceforth required. See 25 U.S.C. 1321(a), 1322(a), 1326. But, of special relevance to our present submission, the law now expressly condoned *partial* assumption of jurisdiction, criminal or civil, by mutual consent of the State and the affected Tribe. And such new jurisdiction may be limited as to subject matter ("such measure") or geographical area ("Indian country or any part thereof"). 25 U.S.C. 1321(a), 1322(a).

Of course, since the Washington statute we are considering was enacted in 1963, these provisions are

not directly applicable.[53] But, on both sides, it is argued that they throw light on the congressional understanding of 1953 when Public Law 280 was enacted. The basic issue is whether the provisions for partial assumption of jurisdiction introduced in 1968 effected a *change*.

The short answer is that there was a conflict of opinion. As the State of Washington correctly points out (Br. 49-51), the Department of the Interior, both in 1963 and 1968, commented in communications to the Congress that the new provision allowing partial assumption of jurisdiction merely made "explicit" a conclusion which, in its view, was already "implicit" in Public Law 280 as originally enacted. Wash. Br. 60, 68-69.[54] But others disagreed. Arthur Lazarus, an attorney representing several Tribes, complained that "[o]ne of the major objections to Public Law 280 is its 'all or nothing' approach, requiring States to assume all jurisdiction in Indian reservations if

[53] Except as the State contends that Congress in 1968 "ratified" its 1963 statute, a point we discuss separately, *infra*, pp. 83-86.

[54] In 1965, however, the Department was suggesting to the Congress that the proposed "extension of criminal jurisdiction to the States on a piecemeal basis needs to be considered further," apparently treating the matter as a *new* idea. Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 320 (1965) (hereinafter "1965 Hearings"). The Department of the Interior has long since abandoned the views expressed in the 1963 and 1968 letters.

any jurisdiction is desired." 1968 Hearings at 116.[55] See, also, *id.* at 113-114. And the Deputy Attorney General, arguing *against* partial assumption, was at least impliedly addressing what he took to be a change effected by the new proposal. 1968 Hearings at 28.[56]

More important, however, is the view entertained by the Congress itself. The State in its Brief (at 56-57) has reproduced an exchange between Senator McClure and Mr. Lazarus in which the Senator notes Interior's statement that partial jurisdiction was always authorized. We do not know whether, at the end of the day, Senator McClure accepted that representation as correct. But we do have a strong indication that Senator Ervin, the primary sponsor of what became the Indian Civil Rights Act, believed his bill would make a new contribution by encouraging States that were reluctant to assume the heavy financial burden of full jurisdiction, henceforth to accept "a piecemeal cession by the Federal Government of jurisdiction over Indian country." 111 Cong. Rec. 1784

[55] Here and elsewhere "1968 Hearings" refers to Hearings on H.R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968).

[56] See, also, the Interior Department report of 1965, note 54, *supra*, in which the Department of Justice is then also represented as opposing partial assumption of criminal jurisdiction:

> The Department of Justice has indicated that this approach in the criminal area is undesirable. Such an extension of jurisdiction may result in unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs. [1965 Hearings at 321.]

(1965); 1965 Hearings at 4. And, significantly, before voting on the legislation, the House of Representatives as a whole was expressly told by Congressman Aspinall, the Chairman of the Committee on Interior and Insular Affairs, that authorization for partial assumption of jurisdiction *was* a change in the law. 114 Cong. Rec. 9615 (1968). This statement carries special weight, coming as it does from one who took an active part in framing Public Law 280 in 1953 and was, accordingly, in a better position than most Members to know the intended scope of the original legislation. See 1953 Hearings at 16, 17, 18, 19, 20, 30-31, 32.

In our submission, the available evidence indicates that the framers of the 1968 amendments believed that in authorizing partial assumption of jurisdiction they were changing the law. That is of course consistent with the general presumption that accords meaning to an otherwise unexplained textual addition. But if the prevailing opinion in 1968 were deemed open to doubt, we must return to the understanding of 1953. At *that* date, as we have seen, no one remotely suggested that piecemeal assumption of jurisdiction by the States was contemplated.

d. Strictly, it is irrelevant why the Congress of 1968 thought it right to condone partial assumption when their predecessors of 1953 thought otherwise. But, in fact, there is no contradiction. As we know, in the mid-1950's the congressional climate favored total federal disentanglement from the "Indian problem" and swift assimilation of the Tribes into the

general population. That policy argued for wholesale transfer of jurisdiction to the States. By 1968, that simplistic approach had been abandoned. What is more, the experience of the intervening 15 years had shown that many States were unwilling to assume the full responsibility offered them in Public Law 280.[57] As Senator Ervin explained (111 Cong. Rec. 1784 (1965); 1965 Hearings at 4):

> Some States claim that Public Law 280 imposes too great a financial burden and that subsidies from the Federal Government are needed if the States are adequately to enforce law on the reservations. In addition, some States indicate that a piecemeal cession by the Federal Government of jurisdiction over Indian country would be more feasible.

And so, now, the panacea of a complete transfer of jurisdiction having failed, "the breakdown in the administration of justice" within Indian country remaining unsolved (*ibid.*), Congress was willing to compromise. But it does not follow that the inefficient crazy-quilt pattern of overlapping jurisdiction deliberately avoided in 1953 was to be freely condoned for the future. There was now an important brake on partial assumption of jurisdiction: a new requirement of tribal consent. That condition, it was under-

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[57] See, *e.g.*, the South Dakota provisions for full jurisdiction described in *Petition of Hankins, supra.* Because assumption of jurisdiction (except for highways) was conditioned on receipt of a federal subsidy, which was not forthcoming, the law never became operative.

stood, would prevent wholly irrational or one-sided arrangements. As Mr. Lazarus put it, once tribal consent was necessary, "[a] piecemeal approach implies negotiation back and forth between the Indians and the state authorities." 1968 Hearings at 113. And, of course, any *consensual* arrangement is more likely to breed cooperation and to minimize jurisdictional disputes.

What is more, it may be doubted whether even the 1968 law was meant to authorize the complex checkerboard scheme enacted by Washington in 1963. Because all arrangements must be by mutual consent, we may assume the 1968 amendments permit very wide flexibility. But, of course, even popular approval does not condone wholly irrational or discriminatory solutions. Cf. *Lucas* v. *Colorado Gen. Assembly*, 377 U.S. 713, 736-737 and n. 29. To take an extreme example, the 1968 law cannot be construed as validating a scheme, although jointly agreed by the State and a majority of tribal members, that withheld access to State courts from members who are not "in good standing." The Act of Congress must be deemed to foreclose any constitutionally objectionable arrangement.

We do not reach the question whether Washington's 1963 law oversteps the line established by the Equal Protection and Due Process Clauses. But there is ground for doubting whether the relevant provisions of the 1968 Act, in authorizing State assumption of criminal or civil jurisdiction over "any part" of Indian country (25 U.S.C. 1321(a), 1322(a)),

meant to permit reestablishing the checkerboard jurisdictional pattern *within a reservation* that Congress itself had condemned 20 years earlier. That would amount to redefining "Indian country" in derogation of 18 U.S.C. 1151. Much more likely, it seems to us, the phrase "any part" of Indian country connotes a discrete geographical area, made up of contiguous tracts.[58]

Of course, the Court need not finally resolve that question here. Yet, if Washington's 1963 law does not pass muster (even assuming tribal consent) under the 1968 Act, this is a further indication how far it is from satisfying Public Law 280 as originally enacted, for not even Washington contends that the State's options were greater before 1968 than they are today.

C. Alleged Congressional Ratification of Washington's Partial Assumption of Jurisdiction

The State of Washington advances in this Court what appears to be a new argument: that, in 1968, Congress "confirmed" or "ratified" the jurisdictional scheme prevailing under the 1963 State statute (Br. 51-58). Primarily, we suppose, Washington is suggesting that the alleged confirmation indicates the validity of its partial assumption of jurisdiction under Public Law 280 as originally enacted. But the

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[58] Thus, for instance, the 1968 amendments would condone a consensual arrangement that applied State law within the cities of Wapato and Toppenish *regardless of land title*—most of the population and land there being non-Indian (Wash. Br. 34-35)—but not elsewhere within the Yakima Reservation.

State is perhaps saying, alternatively: "even if our action was unauthorized at the time, it was validated for the future in 1968." The two points may be taken together.

1. It is first said that Congress was made aware of the decision in *Quinault Tribe of Indians* v. *Gallagher*, *supra*, which rejected a challenge to Washington's 1963 law as an unauthorized partial assumption of jurisdiction. In fact, the only evidence adduced in support of that assertion is a colloquy in *1965* between the Tribal Chairman, the Tribe's attorney and Senator Ervin, at a time when the case was still pending on appeal. Wash. Br. 53-54. We are at a loss to appreciate how this shows congressional confirmation of the subsequent ruling by the court of appeals.

We may, however, assume that the Congress became aware of the Ninth Circuit's decision in *Quinault* some time later. But, without more, we cannot proceed to the conclusion that the result was therefore congressionally approved. Moreover, as the State correctly notes, the holding of that case was *not* that Public Law 280 authorized a partial assumption of jurisdiction. Rather, the court reasoned that the State was willing to assert *full* jurisdiction and that only the Tribe's non-acquiescence produced the limited scheme complained of. See Wash. Br. 52. That somewhat disingenuous rationale has since been abandoned by the Ninth Circuit as a whole (see pp. 65-67, *supra*). But, in 1966, 1967 and 1968, if Congress were focusing on the *Quinault* opinion, it would presumably have been read as *avoiding* the partial jurisdiction issue.

Nor were there, at the time, any other final decisions upholding partial jurisdiction. The Washington Supreme Court did not decide *Makah Indian Tribe* v. *State*, *supra*, until 1969. Indeed, the only square holding on the issue then published was *Petition of Hankins*, *supra*, in which the South Dakota Supreme Court had *invalidated* a State statute asserting limited jurisdiction on the ground that this was *not* authorized by Public Law 280. Thus, if Congress were looking to judicial precedents to guide its work, it would presumably have concluded that existing law did not permit partial assumption of jurisdiction.

2. The State, however, contends that the savings clause in the repeal of Section 7 of Public Law 280 ratified all previous State assertions of jurisdiction, including what Washington had done in 1963. The provision invoked is Section 403(b) of the Civil Rights Act of 1968, 82 Stat. 79, 25 U.S.C. 1323 (b), which reads as follows:

> Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

It is true that the relevant House Committee, at least, had been made aware that three States, Nevada,[59] Idaho and Washington, had assumed partial

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[59] Nevada, we are advised, promptly retroceded all jurisdiction previously acquired, except only for the Ely Colony where the Tribe consented to its continuance. See American Indian Policy Review Commission, *Final Report*, *supra*, at 202, 209.

jurisdiction over portions of Indian country, and that some of the affected Tribes, including the Yakimas, were unhappy about the consequences. Wash. Br. 54-57, 68. And it is equally true that nothing in the 1968 amendments expressly repudiates or condemns those state actions. But it hardly follows that the Congress of 1968 should be viewed as ratifying these isolated assertions of jurisdiction, *even if invalid when made*. There were, after all, far more numerous cases of full assumption, including those accomplished in Washington under the 1957 statute. At all events, we cannot forget that the most authoritative voices in the Congress had said, in effect, that Public Law 280 did not authorize partial assumption of jurisdiction. Plainly, Section 403(b) did not immunize from challenge any prior assertion of jurisdiction. Like any savings clause, it merely did not disturb previous cessions: in its own terms, did "not affect" them. The upshot is that the validity of earlier assertions of jurisdiction is to be judged without reference to the 1968 law.

Nor does the retrocession provision, Section 403(a), 25 U.S.C. 1323(a), support the State. To be sure, we find there a reference to partial jurisdiction. But, carefully read, the Section merely authorizes a State to retrocede so much of its acquired jurisdiction as it chooses. That it may *return* only a part in no way implies that it could validly have acquired less than full jurisdiction over any reservation.

In our submission, the ratification argument is wholly without substance.

D. Practical Consequences

Most of what we have said about the very limited unsettling effect of a ruling accepting the disclaimer argument (*supra*, pp. 56-59), applies equally here. Indeed, for the reasons fully particularized in the dissenting opinion to the *en banc* decision below (J.S. 55-56, 59), invalidating Washington's 1963 law as an unauthorized partial assumption of jurisdiction would have an even lesser impact, affecting primarily some 10,000 Indians in eight Washington reservations, almost two-thirds of whom belong to the Yakima Nation.

In sum, here, also, there is no practical obstacle to upholding the limitations imposed by Public Law 280. The only consequence would be to end a wholly inefficient jurisdictional scheme and to permit new accommodations between the affected Indian Tribes and the State to be negotiated at arm's length. That was the congressional goal in requiring tribal consent for the future and encouraging retrocession for the past. It was, only recently, the announced policy of Washington's Governor. See Hearings on S. 2010 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., Pt. 2, 480-489 (1976). No one need fear such a benign result.

Of course, the Court cannot legislate this outcome merely because it is desirable. But, there ought be no reluctance to restore the original congressional understanding. As one examines the history of the implementation of Public Law 280, it is difficult to avoid

the conclusion that the State of Washington fuliy appreciated the dilemma it faced under the new federal law. After a decade, it simply overstepped the limits imposed. Unfortunately, its action was condoned by the federal courts, no doubt in part misled by the equivocation of federal officials. A decade later, a majority of the court of appeals was unwilling to disturb the status quo. Today, at long last, the issue reaches this Court on plenary consideration. As it happens, every consideration now argues for returning the decision to the parties themselves, where it always belonged. It is not too late.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTES INVOLVED

1. Enabling Act for the Admission of Washington and Other States (25 Stat. 676), Section 4

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

* * * * *

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the

Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States: that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United

States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

2. Constitution of the State of Washington (1889), Arts. 26 and 23

ARTICLE XXVI

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing

in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and execpt such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

ARTICLE XXIII

AMENDMENTS

§ 1. *How Made.* Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval at the next gen-

eral election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution, and proclamation thereof shall be made by the governor: Provided, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such (each) amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

§ 2. *Constitutional Conventions.* Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

§ 3. *Submission to the People.* Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people.

3. Public Law 280 (67 Stat. 588)

AN ACT To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and

effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the

chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be,

to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

4. Washington Laws, 1957, ch. 240

§ 1. The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

§ 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this chapter: *Provided*, That with respect to the Colville, Spokane, or Yakima tribes or reservations, he shall not issue such proclamation unless the resolution of the tribal council has been ratified by a two-thirds majority of the adult enrolled members of the tribe voting in a referendum called for that purpose.

§ 3. Sixty days from the date of issuance of any proclamation of the governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to

the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and the criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

§ 4. Sixty days from the date of issuance of any proclamation of the governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the Indian lands prescribed in the proclamation to the same extent that this state has jurisdiction over other civil causes of action and those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such Indian lands as they have elsewhere within this state.

§ 5. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

§ 6. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or

with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

§ 7. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

5. Washington Laws 1963, ch. 36 (codified in RCW §§ 37.12.010-37.12.070 (1964))

37.12.010 *Assumption of criminal and civil jurisdiction by state.* The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal juris-

diction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 *—Resolution of request—Proclamation by governor, 1963 act.* Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

37.12.030 *Effective date for assumption of jurisdiction—Criminal causes.* Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 *—Civil causes.* Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.050 *State's jurisdiction limited by federal law.* The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 *Chapter limited in application.* Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to

possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.

37.12.070 *Tribal ordinances, customs, not inconsistent with law applicable in civil causes.* Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

[N.B. Except for the addition of the words "and tidelands" and "Indian land grants" to Section 37.12.-060, the last three sections above are carried over intact from the 1957 statute.]

6. Civil Rights Act of 1968, Title IV, 89 Stat. 78, 25 U.S.C. 1321-1326

§ 1321

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with re-

spect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Pub. L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78.

§ 1322

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty,

agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.

§ 1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

§ 1324

Notwithstanding the provisions of any enabling Act for the admission of a State, the con-

sent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Pub. L. 90-284, Title IV, § 404, Apr. 11, 1968, 82 Stat. 79.

§ 1325

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the

day following the date of final determination of such action.

Pub. L. 90-284, Title IV; § 405, Apr. 11, 1968, 82 Stat. 80.

§ 1326

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub. L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.

APPENDIX B

CHART I
CRIMINAL JURISDICTION BEFORE PUBLIC LAW 280

LEGEND

W = NON-INDIAN
I = INDIAN
$I_{JR.}$ = INDIAN JUVENILE
O = NO VICTIM

S = STATE JURISDICTION
F = FEDERAL JURISDICTION
T = TRIBAL JURISDICTION
F/T = CONCURRENT FEDERAL AND TRIBAL JURISDICTION

	KIND OF OFFENCE				
	STATUS OF LAND				
RACE AND AGE OF OFFENDER	MAJOR CRIMES		LESSER CRIMES		TRAFFIC OFFENCES
RACE OF VICTIM	TRUST LAND	FEE LAND	TRUST LAND	FEE LAND	ALL
W v. W	1 S	2 S	3 S	4 S	5 S
W v. O	6 S	7 S	8 S	9 S	10 S
W v. W + I	11 F	12 F	13 F	14 F	15 F
W v. I	16 F	17 F	19 F	19 F	20 F
I v. W	21 F	22 F	23 F/T	24 F/T	25 F/T
$I_{JR.}$ v. W	26 F	27 F	28 F/T	29 F/T	30 F/T
I v. W + I	31 F	32 F	33 F/T	34 F/T	35 F/T
$I_{JR.}$ v. W + I	36 F	37 F	38 F/T	39 F/T	40 F/T
I v. O	41 —	42 —	43 T	44 T	45 T
$I_{JR.}$ v. O	46 —	47 —	48 T	49 T	50 T
I v. I	51 F	52 F	53 T	54 T	55 T
$I_{JR.}$ v. I	56 F	57 F	58 T	59 T	60 T

AUTHORITIES

Cases 1-5: *United States* v. *McBratney*, 104 U.S. 621, reaffirmed in *N.Y. ex rel. Ray* v. *Martin*, 326 U.S. 496; and see *United States* v. *Antelope*, 430 U.S. 641, 643 n.2, 644 n.4, 648 n.9.

Cases 6-10: Truly victimless crimes not involving Indians or their property are logically within the *McBratney* rule, *supra*. But see cases 11-15.

Cases 11-15: Presumably, the presence of an Indian victim removes these cases from the *McBratney* rule and brings them under 18 U.S.C. 1152, as construed in *Donnelly* v. *United States*, 228 U.S. 243; and see *Oliphant* v. *Suquamish Indian Tribe*, No. 76-5729, decided March 6, 1978, slip op. 11-12. Concurrent tribal jurisdiction is foreclosed by the ruling in *Oliphant*. These cases probably embrace offences where there is no identifiable victim, but the Indian population of the reservation is immediately endangered, *e.g.*, 18 U.S.C. 832. By virtue of 18 U.S.C. 1151, Section 1152 applies to all land within the reservation, regardless of its trust or unrestricted status.

Cases 16-20: Same as cases 11-15.

Cases 21 and 22: 18 U.S.C. 1153 for federal jurisdiction, status of land being equally irrelevant under this Section. Although concurrent tribal jurisdiction may exist in theory (*Oliphant*, *supra*, slip op. 12 n.14; *United States* v. *Wheeler*, No. 76-1629, decided March 22, 1968, slip op. 11 n.22), such jurisdiction is in practice removed by the severe limitation on tribal court sentencing power imposed by the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(7).

Cases 23, 24 and 25: 18 U.S.C. 1152 for federal jurisdiction; "double jeopardy" exception to 18 U.S.C. 1152, noted in *Wheeler*, *supra*, slip op. 11, implies concurrent tribal jurisdiction.

Cases 26 and 27: Same as cases 21 and 22. Although, if under 18, the offender may be dealt with under the federal Juvenile Delinquency Act (18 U.S.C. 5031-5042), he cannot be surrendered to State authorities under 18 U.S.C. 5032 since the State lacks jurisdiction over Indians within Indian country. Cf. *Fisher* v. *District Court*, 424 U.S. 382.

Cases 28, 29 and 30: Same as 23, 24 and 25: for relevance of age, see cases 26 and 27.

Cases 31 and 32: Same as cases 21 and 22: race of the victim is irrelevant under 18 U.S.C. 1153.

Cases 33, 34 and 35: 18 U.S.C. 1152. Presumably, because of the presence of a non-Indian victim, these cases are not exempted by the first exception to Section 1152, and are the same as cases 23, 24 and 25.

Cases 36 and 37: Same as cases 26, 27, 31 and 32.

Cases 38, 39 and 40: Same as cases 28, 29, 30, 33, 34 and 35.

Cases 41 and 42: There are no truly victimless "major crimes" within 18 U.S.C. 1153.

Cases 43, 44 and 45: Logically, the first exception to 18 U.S.C. 1152 embraces offenses not involving non-Indians. See *In re Mayfield*, 141 U.S. 107; *United States* v. *Quiver*, 241 U.S. 602.

Cases 46 and 47: Same as cases 41 and 42.

Cases 48, 49 and 50: Same as cases 43, 44 and 45.

Cases 51 and 52: Same as cases 21, 23, 31 and 32.

Cases 53, 54 and 55: First exception to 18 U.S.C. 1152. See *United States* v. *Wheeler*, *supra*, slip op. 11.

Cases 56 and 57: Same as cases 26, 27, 36 and 37.

Cases 58, 59 and 60: Same as cases 53, 54 and 55.

CHART 2

CRIMINAL JURISDICTION UNDER WASHINGTON'S 1963 LAW

RACE AND AGE OF OFFENDER	KIND OF OFFENCE / STATUS OF LAND: MAJOR CRIMES		LESSER CRIMES		TRAFFIC OFFENSES
RACE OF VICTIM	TRUST LAND	FEE LAND	TRUST LAND	FEE LAND	ALL
W v. W	1 S	2 S	3 S	4 S	5 S
W v. O	6 S	7 S	8 S	9 S	10 S
W v. W + I	11 S	12 S	13 S	14 S	15 S
W v. I	16 S	17 S	18 S	19 S	20 S
I v. W	21 F	22 S	23 F/T	24 S	25 S
I JR. v. W	26 S	27 S	28 S	29 S	30 S
I v. W + I	31 F	32 S	33 F/T	34 S	35 S
I JR. v. W + I	36 S	37 S	38 S	39 S	40 S
I v. O	41 -	42 S	43 T	44 S	45 S
I JR. v. O	46 S	47 S	48 S	49 S	50 S
I v. I	51 F	52 S	53 T	54 S	55 S
I JR. v. I	56 S	57 S	58 S	59 S	60 S

NOTE

THIS CHART ASSUMES, ARGUENDO, THE CORRECTNESS OF THE STATE'S POSITION THAT:

(1) STATE JURISDICTION, WHEN IT ATTACHES, IS EXCLUSIVE OF BOTH FEDERAL AND TRIBAL JURISDICTION, AND THAT

(2) ALL OFFENCES BY NON-INDIANS ARE SUBJECT TO STATE JURISDICTION ONLY.

AUTHORITIES

Cases 1-10: Same as cases 1-10 in chart 1. Washington's 1963 statute, like Public Law 280 (18 U.S.C. 1162(a)), assumes the *McBratney* rule and deals only with offenses "committed by or against Indians." RCW 37.12.030.

Cases 11-20: RCW 37.12.010, excepting only "Indians," which the State construes as encompassing only offenses committed *by* them.

Case 21: Exempted by RCW 37.12.010 because crime by an adult Indian on trust land. For federal jurisdiction, see chart 1.

Case 22: State jurisdiction under RCW 37.12.010 because on land held in fee.

Case 23: Exempted by RCW 37.12.010 because crime by an adult Indian on trust land. For concurrent federal and tribal jurisdiction, see chart 1.

Case 24: Same as case 22.

Case 25: State jurisdiction under RCW 37.12.010 because motoring offenses are one the eight special subject-matter categories, as to which jurisdiction is asserted regardless of race and land status.

Cases 26-30: State jurisdiction under RCW 37.12.010 because "juvenile delinquency" is one of the eight categories.

Case 31: Same as case 21.

Case 32: Same as case 22.

Case 33: Same as case 23. For concurrent federal and tribal jurisdiction, see chart 1.

Case 34: Same as case 24.

Case 35: Same as case 25.

Cases 36-40: Same as cases 26-30.

Case 41: Same as case 21, but no victimless federal "major crime."

Case 42: Same as cases 22 and 32.

Case 43: Same as case 33. For exclusive tribal jurisdiction, see chart 1.

Case 44: Same as cases 24 and 34.

Case 45: Same as cases 25 and 35.

Cases 46-50: Same as for cases 26-30, 36-40.

Case 51: Same as cases 21 and 31.

Case 52: Same as cases 22, 32 and 42.

Case 53: Same as case 43.

Case 54: Same as cases 24, 34 and 44.

Case 55: Same as cases 25, 35 and 45.

Cases 56-60: Same as cases 26-30, 36-40 and 46-50.